ORIGINAL

IN THE SUPREME COURT OF FLORIDA

MAURICE ANTONIO MANN
and
PEDRO ARENCIBIA,
Petitioners,

v

CHIEF JUDGE OF THE THIRTEENTH JUDICIAL CIRCUIT et al.,
Respondents.
_____/

CASE NO.: 90,498

DISTRICT COURT OF APPEAL, SECOND DISTRICT NOS.: 97-00566
97-00962

INITIAL BRIEF OF PETITIONER PEDRO ARENCIBIA

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PRELIMINARY STATEMENT

The District Court of Appeals, Second District certified this cause to this Court pursuant to Fla. R. App. P. 9.125, without ruling on the merits of the Petitioner's claims. This cause was not brought as an appeal from a final order of the trial court, but rather as a petition for writ of mandamus or in the alternative for writ of certiorari that was filed by the Petitioner Arencibia, and a petition for writ of certiorari that was filed by the Petitioner Mann. Thus, the issues were presented to the District Court of Appeal solely upon the petitions that were filed and the response and replies thereto, not upon any record from the circuit court. For that reason, and because the circuit court is not due to complete its record until *after* the due date of this brief, herein references to the proceedings below will be made by citation to the specific page of Pedro Arencibia's Petition for Writ of Mandamus and in the Alternative a Petition for Writ of Certiorari (hereinafter Petitioner Arencibia's Petition), or its appendix, as follows: "Appendix to Petitioner Arencibia's Petition, at A___."

Because the District Court of Appeal, Second District did not make any decision on the merits of the cause, it cannot be determined who is the appellant or appellee to this proceeding. Therefore, Pedro Arencibia will be referred to herein as the Petitioner Arencibia, Maurice Antonio Mann will be referred to herein as the Petitioner Mann, and the Chief Judge of the Thirteenth Judicial Circuit will be referred to herein as the Respondent.

STATEMENT OF THE CASE

On February 17, 1997, counsel for the Petitioner Maurice Antonio Mann filed a Petition for Certiorari in Maurice Antonio Mann v. Chief Judge of the Thirteenth Judicial Circuit, Second District Court of Appeal number 97-00566. On March 12, 1997, counsel for the Petitioner Pedro Arencibia filed a Petition for Writ of Mandamus and in the Alternative a Petition for Writ of Certiorari in Pedro Arencibia v. Honorable Chief Judge F. Dennis Alvarez et al., Second District Court of Appeal number 97-00962. Both petitions attacked the jurisdiction of a "drug division" comprised of Division X and Division Y that was created in the Thirteenth Judicial Circuit by Administrative Order Number S-04-29-97-003 (hereinafter referred to as "the Order"). The Order was issued by the Respondent, the Chief Judge of the Thirteenth Judicial Circuit.

On motion of the Respondent, the District Court of Appeal, Second District consolidated the two proceedings on March 26,1997. On May 9,1997, the District Court of Appeal, Second District issued a Certification of Orders Requiring Immediate Resolution by the Supreme Court, which requested this Court to accept jurisdiction pursuant to Fla. R. **App.** P. 9.125. This Certification did not decide the merits of the Petitioners' claims. This Court accepted jurisdiction **by** order on May 14, 1997.

STATEMENT OF THE FACTS

The Honorable F. Dennis Alvarez, Chief Judge of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed Administrative Order Number S-04-29-97-003 on January 15, 1997, establishing a "Drug Division" (Division "X" and "Y"). (Appendix to Petitioner Arencibia's Petition, at A1-A5).

As stated in the Order, the alleged rationale for establishing this division included the need to deal with the problems of drug addiction and crimes stemming therefrom, and the argument that drug rehabilitation is less expensive than incarceration. (Appendix to Petitioner Arencibia's Petition, at A1). Furthermore, as stated in the Order, the Chief Judge's alleged rationale for establishing this division by an Order was that the Order created a "specialized section of the Criminal Justice Division to handle drug cases." (Appendix to Petitioner Arencibia's Petition, at A1). Prior to the Order, all felony criminal cases in the Thirteenth Judicial Circuit were assigned by random or blind rotation.

Pursuant to the Order, the jurisdictional requirement for new cases to be filed in the Drug Division and assigned to Division "X" after January 21, 1997, is that "...drug offenses shall be filed in the Drug Division and assigned to Division 'X.'" (Appendix to Petitioner Arencibia's Petition, at A3). However, certain exceptions apply in that if a forcible felony or a first degree or higher non-drug felony is charged as part of the Information or Indictment along with a drug offense, this case would not be filed in Division "X." (Appendix to Petitioner Arencibia's Petition, at A4). Furthermore, if a drug case includes multiple defendants who are charged with non-drug offenses, a defendant's case shall not be filed in the Drug Division and assigned to Division "X" until "after

[a] plea, conviction or conclusion" has occurred on those co-defendants. (Appendix to Petitioner Arencibia's Petition, at **A4).**

According to the Order, if a person is convicted or enters a plea of guilty or no contest in Division "X," receives community sanctions pursuant to the Sentencing Guidelines, and acknowledges a desire and need for drug treatment, then that case shall be transferred to Division "Y" for court-supervised treatment. (Appendix to Petitioner Arencibia's Petition, at A3). However, if an individual is convicted or enters **a** plea of guilty or no contest in Division "X," is placed on community sanctions, but does *not* acknowledge a need and desire for drug treatment, then it appears from the Order that the case remains in Division "X." (Appendix to Petitioner Arencibia's Petition, at A3).

Pursuant to the Order, if a defendant is currently on community sanctions in Division "X" and violates such sanctions, and if the defendant at that point acknowledges a need and desire for drug treatment, the defendant's case may still be transferred to Division "Y." (Appendix to Petitioner Arencibia's Petition, at A3-A4). However, if a defendant is on community sanctions in Division "Y" and is charged with **a** new felony, and the new felony charge does not disqualify the defendant from the Drug Division (i.e. not a forcible felony or first degree felony or higher or charged with a co-defendant), the violation of the community sanction and the new felony charge shall be handled by Division "X." (Appendix to Petitioner Arencibia's Petition, at A4). If the defendant is not convicted of the new charge, the case is returned to Division "Y." (Appendix to Petitioner Arencibia's Petition, at A4). However, if the defendant is convicted or enters a plea to the new charge, receives community sanctions, and acknowledges a need and desire for drug treatment, the case is transferred back to Division "Y." The Order does not specify where a case will be

transferred for supervision when a defendant is convicted or pleas to a new charge, receives community sanctions, and does *not* acknowledge a need and desire for drug treatment.

Pursuant to the Order, if a defendant on community sanctions in the Drug Division is charged with a forcible felony or first degree felony or higher or with a co-defendant, the new case shall be transferred to a letter division along with the case for which the defendant is under supervision in the Drug Division. (Appendix to Petitioner Arencibia's Petition, at A4). However, if the defendant is found not guilty of the new charge, the defendant shall be transferred back to the appropriate division of the Drug Division. (Appendix to Petitioner Arencibia's Petition, at A4).

If a defendant is presently on community sanctions in a letter division for a non-forcible felony and is charged with a drug offense, the Order states that the new case, along with the case which the defendant is under supervision, shall be transferred to the Drug Division. (Appendix to Petitioner Arencibia's Petition, at A4). The Order does not specify where the case will be transferred to within the Drug Division, i.e., which division of the Drug Division. If the defendant is found not guilty of the new charge, the case for which the defendant is under community sanctions will be transferred back to the originating letter division, unless it is determined in Division "X" that the defendant has a need and desire for drug treatment, at which point the case shall be transferred to Division "Y." (Appendix to Petitioner Arencibia's Petition, at A4-A5j.

According to the Order, if it is determined by a letter division court that a defendant has a need and desire for treatment and the defendant is not charged with a forcible felony, and is otherwise eligible for community sanctions, the letter division court may transfer the case to the Drug Division and assign the case to Division "Y" for either sentencing or court-supervised treatment. (Appendix to Petitioner Arencibia's Petition, at A5). However, if this defendant who has

been so transferred to Division "Y" commits a forcible felony thereafter, the forcible felony case along with the supervised case in Division "Y" shall be transferred back to the originating division. (Appendix to Petitioner Arencibia's Petition, at A5). The Order finally states that if all the parties agree, a defendant may be transferred to Division "Y" even if the defendant is charged with a forcible felony on a new case as long as there is a companion drug charge. (Appendix to Petitioner Arencibia's Petition, at A5).

In this case, the Petitioner Arencibia was arraigned on February 20, 1997, and plead not guilty to the charge of Possession of Cocaine in Division "X" before the Honorable Jack Espinosa, Jr. On February 25, 1997, a Motion in Opposition of Jurisdiction was heard before the Honorable Jack Espinosa , Jr., in Division "X." (Appendix to Petitioner Arencibia's Petition, at A42). Judge Espinosa denied the motion by written order on March 7, 1997. (Appendix to Petitioner Arencibia's Petition, at A-46).

On March 12, 1997, the Petitioner Arencibia filed in the District Court of **Appeal,** Second District a Petition for Writ of Mandamus and in the Alternative a Petition for Writ of Certiorari. This Petition named as respondents the Honorable F. Dennis Alvarez, Chief Judge of the Thirteenth Judicial Circuit; the Honorable Jack Espinosa, Jr., circuit judge of Division "X;" and the Honorable Donald C. Evans, circuit judge of Division "Y." Petitioner Arencibia requested the District Court of Appeal to issue a writ of mandamus compelling the Chief Judge of the Thirteenth Judicial Circuit to set aside the administrative order creating the drug division, and in the alternative requested the District Court of Appeal to issue a writ of certiorari quashing the administrative order. (Petitioner Arencibia's Petition, at page 9). The District Court of Appeal, Second District consolidated Mr. Arencibia's petition and Mr. Mann's petition on March 26, 1997. On May 9, 1997, the District

Court of Appeal, Second District certified the consolidated matter to this Court for resolution pursuant to Fla. R. App. P. 9.125, but did not make any determination of the merits of the petitioners' claims.

SUMMARY OF THE ARGUMENT

The Respondent acted in excess of his jurisdiction when he promulgated Administrative Order S-04-29-97-003, creating the drug division, because a drug division is a specialized division that must be created by local rule or general law, rather than by administrative order. Art. V, §§ 7, 20(10) Fla. Const. and § 43.30 Fla. Stat. (1997), read together, mandate that any *specialized divisions* (not just subject matter divisions) be created by local rule or by general law. The drug division of the Thirteenth Judicial Circuit is clearly a specialized division within the meaning of Art. V, §§ 7, 20(c)(10) Fla. Const. and § 43.30 Fla. Stat. (1997), so the Respondent was required to create the division by local rule rather than by administrative order. The creation of the drug division by administrative order is contrary to the legislative intent behind the 1972 reforms to Article V, Fla. Const., which were enacted to create a simple two-tier (county and circuit) court system and to eliminate the confusing morass of specialized courts that was then in existence.

The requirement of a local rule for the creation of a specialized division opens up the process of creating a new specialized division to public comment and participation, and subjects the division to the ultimate approval of this Court. By using an administrative order to create the drug division, the Respondent circumvented these procedural safeguards against the proliferation of new court divisions. The administrative order therefore violated the letter, the intent, and the purpose of the local rule requirement of Article V and § 43.30 Fla. Stat. (1997).

LEGAL ARGUMENT: THE "DRUG DIVISION" OF THE THIRTEENTH JUDICIAL CIRCUIT WAS UNCONSTITUTIONALLY CREATED BY ADMINISTRATIVE ORDER RATHER THAN BY LOCAL RULE

In the Florida Constitution, the Judiciary is governed by Article V. Art. V, § 7 Fla. Const. governs the creation of specialized court divisions, as follows:

> **§ 7 Specialized divisions:**
> **All** courts except the supreme court may sit in divisions as may be established by general law. A circuit or county court may hold civil and criminal trials and hearings in any place withing the territorial jurisdiction of the court as designated by the chief judge of the circuit.

This provision was adopted March 14, 1972. West's F.S.A. Const. Art. V, § 7. The creation of court divisions is further provided for by Article V, § 20(c)(10) Fla. Const., which reads:

> (c)(10) All courts except the supreme court may sit in divisions as may be established by local rule approved by the supreme court.

This provision was also adopted March 14, 1972, West's F.S.A. Const. Art. V, § 20, and it became effective on January 1, 1973. Art. V, § 20(j) Fla. Const.

Art. V, § 7 Fla. Const. granted the Legislature the power to provide for the creation of court divisions through general law. The Legislature essentially reverted the power to approve court divisions back to the Supreme Court, by enacting a statute that parrots Art. V, § 20(c)(10) Fla. Const. This statute, § 43.30 Fla. Stat. (1997), reads

> All courts except the supreme court may sit in divisions as may be established by local rule approved by the supreme court.

This statute was also adopted in 1972. West's F.S.A. § 43.30.

Thus, both Art. V, § 20(c)(10) Fla. Const. and § 43.30 Fla. Stat. (1997) require that a specialized court division be created by local rule approved by the Supreme Court. The only

exception would be if the Legislature were to enact general law specifically providing for the creation of a specialized court division. Any specialized court division, therefore, must be created by local rule approved by the Supreme Court unless there is a statute authorizing that division.

The Drug Division of the Thirteenth Judicial Circuit is a specialized division, but it has not been enacted by local rule nor provided for by general law. A review of the text of Article V, §§7 and 20(c)(10) and § 43.30 Fla. Stat. (1997), of the legislative history of those provisions, and of the case law construing them shows that the Drug Division must be created by local rule. Its creation by administrative order therefore violates Article V and § 43.30.

A. Legislative Intent

In order to understand the legislative intent behind Article V § 7, $20 (c)(10) Fla. Const. and § 43.30 Fla. Stat. (1997), it is important to appreciate the judicial system that existed in Florida prior to the state constitutional reforms to Article V.

Prior to the 1972 state constitutional reforms to Article V, there existed a constitutional restriction on the number of circuit judges. In order to add judges, the legislature had to create new courts. Commenting on this legislative practice, House Judiciary Chairman Talbot D'Alemberte, whose committee was charged with the task of drafting the 1972 constitutional reforms to Article V, stated

> the legislature has been forced to create the hodgepodge of additional courts to meet the demands for additional judges.

Letter from Talbot D'Alemberte to Honorable Guyte P. McCord of Jan. 5, 1972, in File 13 at the Florida Supreme Court Library (Appendix to Petitioner Arencibia's Petition, at AS). This legislative

practice meant that prior to passage of the constitutional reforms to Article V there were sixteen different types of courts in Florida, which were as follows: circuit court, civil and criminal court, court of record, criminal court of record, felony court of record, claims court, county judges court, county court, juvenile court, special juvenile court, juvenile and domestic relations court, traffic court, justice of the peace court, small claims court, and magistrate court. Talbot D'Alemberte, Florida's Great Leap Forward, 56 Judicature 380, 381 (1973) (Appendix to Petitioner Arencibia's Petition, at A34); Chart of courts existing in Florida on January 21, 1966 prepared by Statutory Revision Department Attorney General's Office Tallahassee, located in the Florida State Archives in material relating to the 1968 Constitutional Revision Commission (Appendix to Petitioner Arencibia's Petition, at A37 - 38).

This highly-fractured court system created inefficiencies, confusion and scandals. Talbot D'Alemberte, Florida's Great Lear, Forward, 56 Judicature at 382 (Appendix to Petitioner Arencibia's Petition, at A35). Jurisdictions for the various courts varied from judicial circuit to judicial circuit. In some judicial circuits, jurisdiction among the various courts actually overlapped, allowing for judge shopping. Id. (Appendix to Petitioner Arencibia's Petition, at A35).

The reforms to Article V abolished this outdated byzantine judicial system by creating our present general two-tier system of circuit and county courts. This two-tier court system provided predictability and consistency throughout the state. The drafters of Article V, in abolishing the multiplicity of courts, also eliminated all specialized courts such as juvenile and domestic relation courts.' A review of selected correspondence to Chairman D'Alemberte regarding the constitutional

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[1] Subsequent to the reforms to Article V, the juvenile and domestic relations divisions were created in the Thirteenth Judicial Circuit by Local Rule No. 1. Local Rule No. 1 also created following specialized divisions: General Civil Division, Criminal Justice Division,

reforms to Article V reveals that the inclusion of § 7 was intended to allow for certain specialized courts. Letter from Honorable Theodore Bruno to Talbot D'Alemberte of August 6, 1971, in File 13 at the Florida Supreme Court Library (Appendix to Petitioner Arencibia's Petition, at Al 1); Letter from Talbot D'Alemberte to Honorable Theodore Bruno of August 16, 1971, in File 13 at the Florida Supreme Court Library (Appendix to Petitioner Arencibia's Petition, at Al 0); Letter from Honorable Harold Clark to Talbot D'Alemberte of July 12, 1971, in File 13 at the Florida Supreme Court Library (Appendix to Petitioner Arencibia's Petition, at A12); Letter from Talbot D'Alemberte to Honorable Harold R. Clark of July 20, 1971, in File 13 at the Florida Supreme Court Library. (Appendix to Petitioner Arencibia's Petition, at A12). Nonetheless, it is clear that the legislators in drafting § 7 restricted the proliferation of specialized courts by requiring that specialized divisions be established through general law. Letter from Talbot D'Alemberte to Honorable Henry L. Balaban of July 13, 197 l, in File 13 at the Florida Supreme Court Library (Appendix to Petitioner Arencibia's Petition, at Al 3).

The drafters of the reforms to Article V also recognized that the local circuits, local bar and the Supreme Court may be better able to evaluate the needs for specialized divisions. Therefore, the schedule to Art. V, at Art. V, § 20(c)(10) Fla. Const., grants the power to create specialized divisions to the Supreme Court, which can approve the creation of a specialized division by the process of a local rule. Chairman Talbot D'Alemberte, Speech Judicial Reform-Now or Never (draft located at Florida Supreme Court Library in File 3(b))(Appendix to Petitioner Arencibia's Petition, at A20); Letter from Talbot D'Alemberte to Harold R. Clark of July 20, 1971, in File 13 at Florida Supreme

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Probate Guardianship and Trusts Division, and East Division (Appendix to Petitioner Arencibia's Petition, at A40 - 41). It is clear that prior to creation of the Drug Division all specialized divisions were created by local rule in the Thirteenth Judicial Circuit.

Court Library (Appendix to Petitioner Arencibia's Petition, at Al 2); Letter from Talbot D'Alemberte to Joe Martin of March 7, 1972, in File 14 at the Florida Supreme Court Library (Appendix to Petitioner Arencibia's Petition, at Al 5).

The reforms to Article V, in allowing flexibility to create specialized divisions, restricted this power by requiring that specialized divisions be created by the use of a local rule. In abridging the power of local circuits to create specialized divisions it is clear that the Legislature intended to avoid a reversion back to the judicial chaos that existed prior to the constitutional reforms to Article V.

The Legislature also had a clear understanding of what constituted a specialized division. The House Judiciary Committee staff analysis of Article V § 7 stated:

> This section provides for specialized divisions in any court as provided by local rule approved by the supreme court. This means that the judges in each circuit, with the approval of the supreme court, could establish for example, a felony, probate, juvenile and civil division.

The Staff Analysis of Article V Revision House Judiciary Committee Public Hearing Draft (Sept. 21, 1971) (located in File 2 at Florida Supreme Court Library) (Appendix to Petitioner Arencibia's Petition, at A25 - 26). The staff analysis provides a non-exclusive list of possible specialized divisions. What also becomes evident in analyzing the legislative intent of § 7, as the title of § 7 plainly indicates, is that a general law or a local rule is required for the creation of any specialized division and not solely for the creation of a "subject-matter" division. Nothing in the text of Art. V, §§ 7 and 20(c)(10), or in § 43.30 Fla. Stat. (1997), limits their scope to just "subject matter" divisions; rather, they encompass any specialized division.

Therefore, whether a local rule is required to create a drug division shall be determined by whether it is a specialized division, not just by whether it is a subject matter division. As shown by

the elaborate structure of the jurisdictional provisions of the Order creating the Drug Division in the instant case, one major function of the Drug Division is to provide specialized court supervision of community sanctions geared specifically for drug offenders. Thus, the creation of the Drug Division contemplated by the Order requires a local rule, not only because its caseload is generally limited to drug charges, but also because it performs the specialized function of supervising community sanctions for drug offenders. In fact, the Order itself attempts to justify the creation of Division "X" in part because of the "high level of knowledge of this methodology" that Division "Y" had attained in supervising drug offenders. (Appendix to Petitioner Arencibia's Petition at Al).

In the instant case there is no doubt that Division "X" and "Y" (the Drug Division) are "specialized divisions" which can be established only by a local rule. The creation of the Drug Division creates the judicial morass and complexity that the reforms in Article V were supposed to eliminate. Once again an attorney must navigate through a jurisdictional labyrinth in order to effectively practice in the Thirteenth Judicial Circuit. In the case of a violation of probation or community control by the commission of a new charge that is a forcible felony, an attorney can expect **that** his client will be bounced in and out of the drug division depending upon the resolution of the new charge. One can only assume that the creation of a Drug Division will soon lead to the establishment of a Burglary Division, White Collar Crime Division, Sexual Offender Division, et cetera solely by means of an administrative order.

The jurisdictional requirements in the Order for assignment to the Drug Division are not to be found in Florida general law. An attorney from another part of the state not versed in nuances of the Order would be at a lost without a copy of the Order to adequately represent his client regarding the overlapping jurisdiction between the Drug Division and the other lettered divisions in the

Thirteenth Judicial Circuit.

The overlapping jurisdictional requirements for probation and community control violations, informations or indictments charging both a drug offense and a forcible felony, and informations and indictments against multiple defendants utterly defeats the primary intent of the reforms of Article V to establish a general two-tier court system consistent throughout the state. Furthermore, the Order promotes another evil sought to be eliminated by the reforms of Article V, which is judge-shopping. Talbot D'Alemberte, Florida's Great Lean Forward, 56 Judicature at 382 (Appendix to Petitioner Arencibia's Petition, at A35). Currently case assignments to letter divisions are done by blind rotation in the Thirteenth Judicial Circuit, thereby prohibiting the State Attorney from knowing which judge will be assigned to the case prior to filing. First Amendment to Administrative Order No. 92-71. However, with the Drug Division, by deciding whether or not to file a forcible felony in conjunction with a drug offense or whether to file an information with multiple defendants, the State Attorney can determine the judge who will hear the case. This Court also has acknowledged that the assignment of judges to specialized divisions can create favorable conditions for the prosecuting party. In addressing the creation of domestic violence divisions, the Court stated in In re Report of the Commission on Familv Courts, 646 So.2d 178, 182 (Fla. 1994) that

> we acknowledge the assertions of defense attorneys that the methods in which judges are assigned to domestic violence cases could raise images of bias in favor of the prosecuting party.

It is easy to envision a situation where the prosecutor who files charges, knowing how the judge assigned to the Drug Division rules on legal and evidentiary issues, will make a decision not to file a forcible felony or combine the defendant with a co-defendant in order to ensure that the case is or is not assigned to the Drug Division.

The above issues need to be addressed prior to the establishment of the Drug Division. However, by implementing the Drug Division by the use of administrative order and not a local rule, the Respondent has obviated the ability of the public and the legal community to address these important issues. Members of the public, judiciary and local bar are foreclosed from raising and confronting these issues. The Local Rules Advisory Committee is also foreclosed from reviewing these issues as well as the supreme court of Florida. Fla.R.Jud.Admin. 2.050 (e).

The creation of the Drug Division is contrary to the legislative intent of both Article V and § 43.30 Fla. Stat. (1997). The same legislative intent applies to § 43.30 as to the revision to Article V, since § 43.30 was re-drafted in 1972 to conform with the changes to Article V. Staff Analysis of HB 4469 As Engrossed (Florida State Archives) (Appendix to Petitioner Arencibia's Petition, at A3 1).

B. Case Analysis

There have been a limited number of cases analyzing what constitutes a division for purposes of Article V, § 7 Fla. Const. These cases have specifically focused on the establishment of a specialized subject-matter division. There is no analysis as to what constitutes a specialized division that is *not* a subject matter division. In fact, the existing case law has limited its analysis to the issue of subject matter jurisdictions, contrary to the legislative intent of Article V, §§ 7 and 20(c)(10) Fla. Const. to govern *all* specialized court divisions. See Administrative Order. Fourth Judicial Circuit /Division of Courts), 378 So.2d 286 (Fla. 1979). The plain language of Article V, § 7 clearly applies to "specialized divisions," and neither Article V, § 7; Article V, § 20(c)(10); nor § 43.30 Fla. Stat. (1997) expressly limits the definition of specialized divisions to subject-matter divisions.

The case law interpreting Art. V, § 7 Fla. Const. is confined to the issue of whether the "division" sought to be established by administrative order creates a "division" within the meaning of Art. V, § 7, or if it simply creates a section of a duly established specialized subject-matter division. It is clear that in the instant case, the Order establishes a specialized subject-matter division.

In Administrative Order. Fourth Judicial Circuit (Division of Courts), 378 So.2d 286 (Fla. 1979) the Court unequivocally held that a subject-matter division must be established by local rule. The Court addressed a petition of county judges of the Fourth Judicial Circuit that raised the issue of whether a administrative order created a subject-matter division within the county courts in violation of Art. V, § 20(c)(10) Fla. Const. The Court held:

> All circuits which operate with subject matter divisions should establish appropriate subject matter divisions by local rules approved by this Court in accordance with article V section 20(c)(10).

The Supreme Court provided a non-exclusive list of possible examples of subject matter divisions: criminal, civil, juvenile, probate, and traffic. Id. However, a plain reading of Art. V, §§ 7 and 20(c)(10) Fla. Const. clearly requires a local rule procedure whether the specialized division is classified as a subject-matter division or not. It is the classification of a division as specialized that triggers the local rule procedure. Art. V, §§ 7, 20(c)(10); § 43.30 Fla. Stat. (1997).

The supreme court has found an exception to the local rule requirement of in Art. V, $20 (c)(10) Fla. Const. and § 43.30 Fla. Stat. (1997) only when there is a clear legislative intent to preempt the local rule requirement. In In re Report of the Commission on Family Courts, 646 So.2d 178, 18 1 (Fla. 1994), the Court was faced with conflicting legislative directives regarding family law divisions and the criminalizing of violations of domestic violence injunctions. The Court wrote that in Fla. Laws ch. 90-273, the Legislature directed that

> all family issues be handled by judges assigned to family law divisions [and] unquestionably, domestic violence is a family law issue.

Id. at 180. However, in Fla. Laws ch. 94-134, the Legislature by criminalizing domestic violence

> clearly intended to remove the power of judges to use indirect criminal contempt to punish those who violate domestic violence injunctions. This legislative action effectively placed domestic violence injunctions violations within the jurisdiction of the county court criminal judges and removed those violations from the jurisdiction of circuit court family judges unless those judges were specifically assigned to hear those matters as county court judges.

Id. The Court characterized the problems posed by conflicting legislative directives as "an administrative Frankenstein." Id.

This unique and confusing situation generated by the conflicting legislative directives also created other difficulties. The Eleventh Judicial Circuit and Seventeenth Judicial Circuit issued similar administrative orders establishing domestic violence departments within both the family law and county court divisions. These administrative orders were declared invalid as unconstitutionally creating specialized subject-matter divisions without the use of a local rule. Garcia v. Rivkind, 639 So.2d 177 (Fla. 3d DCA 1994); Sapp v. Ross, No. 94-2839 (Fla. 4th DCA October 7, 1994) (unpublished order).

The Supreme Court, confronted with this unique and difficult problem, found that domestic violence courts could be established both by local rule and administrative rules *subject to supreme court review*. In re Report of the Commission on Family Courts, 646 So.2d at 182. In creating this exception for domestic violence courts the Supreme Court specifically held that

> [c]learly, section 43.30 requires that divisions of Florida courts are to be established through local rules approved by this Court. We find, however, that the legislature effectively preempted section 43.30 and the local rule requirement as to family law divisions by establishing a policy in chapter 90-273 that family law divisions were to be created in Florida and by directing

> this Court in that Chapter to ensure that 'family law divisions shall operate with as much consistency as possible throughout the state'.

Id. at 181.

It is apparent the Legislature in Fla. Laws ch. 90-273 exercised its power under Art. V, § 7 Fla. Const. to create a specialized division by general law. The only other method for creating a specialized division is by local rule approved by the Supreme Court, as provided in the schedule of Art. V, § 20(c)(10) Fla. Const. and in § 43.30 Fla. Stat. (1997).

It is clear that domestic violence courts are a specialized subject-matter division that would have to be established by local rule if it were not for the legislative preemption of this requirement found in chapter 90-273. The Drug Division in the instant case is very similar to the domestic violence courts. As with domestic violence courts the Drug Division specializes in a specific subject matter. The Drug Division specializes primarily in violations of Chapter 893 of the Florida Statutes and related offenses. Domestic violence courts specialize in crimes of domestic violence as defined in Chapter 741 of the Florida Statutes. In the instant case there has been no legislative preemption of the local rule requirement allowing for the creation of a Drug Division. Therefore it must be established, if at all, by local rule subject to approval of the Supreme Court.

In Hartley v. State, 650 So.2d 1044, 1047 (Fla. 4th DCA 1995) the Fifteenth Judicial Circuit established by administrative order a division specializing in habitual felony offenders. The Fourth District held that

> the designation of a special court to exclusively handle habitual felony cases constitutes a subject matter related division which must be accomplished by local rule.

The court in reaching its holding that the habitual felony offender division had to be established by local rule compared the habitual felony offender division to divisions specializing in domestic

violence. The court found

> [e]ach can be considered a subdivision of a larger body of law--domestic violence cases a subdivision of family law and habitual felony offender case a subdivision of criminal law.

Id. at 1048. The court also expressly rejected the State's argument that

> because the habitual felony offender division is merely a subdivision of a duly created division, the local rule procedure is therefore unnecessary

when it held that

> however denominated, they create a specialized subject matter related division of the trial courts.

Id., quoting Garcia v. Rivkind, 639 So.2d 177 (Fla. 3d DCA 1994).

In the instant case, the Drug Division is a better example of a specialized subject-matter division than is a habitual felony offender division. A habitual felony offender division simply deals with a category of defendants who qualify to have their sentenced enhanced due to their charge and prior record. § 775.084 Fla. Stat. (1997). The Drug Division deals with a specific subject-matter, i.e. drug offenses. In other words, a habitual felony offender division is concerned with other criteria besides the subject matter of the defendant's charge, such as the defendant's prior record. The Drug Division, on the other hand, is solely concerned with the subject matter of the defendant's charge.

The administrative order held invalid in Hartley is also very similarly drafted to the Order in the instant case. In Hartley, 650 So.2d at 1046, the administrative order stated

> the designation of a special court, within the criminal division, to hear cases involving a restricted category of serious habitual felony offenders will permit the Court to handle a limited caseload and focus its attention on extremely serious cases.

The Order in the instant case similarly states a purpose "to establish a specialized section of the Criminal Justice Division to handle drug cases." (Appendix to Petitioner Arencibia's Petition, at Al).

As in Hartley, the mere classification of the Drug Division as a section of the criminal division does not obviate the need for a local rule. The Drug Division operates as a specialized subject-matter division and mere semantics can not create an exemption from the local rule requirement. Id. at 1048.

The administrative order reviewed in Hartley actually attempted to find a legislative justification for the creation of a habitual felony offender division. It stated

> the Legislature has found that a substantial and disproportionate number of serious crimes is committed in Florida by a relatively small number of multiple and repeat felony offenders.

650 So.2d at 1046. The Order in the instant case cites to no legislative directive suggesting the creation of a Drug Division, because there is none.

The Order simply provides a very generalized justification for the creation of a Drug Division. The Order states :

> crime is a major concern in our community because of the expense it extracts in terms of limited resources and in terms of human suffering; and...it is recognized that the providing of drug treatment to criminal defendants will greatly reduce their appetite for drugs thus reducing their likelihood of engaging in further criminal behavior; and...there has been operating within the Thirteenth Judicial Circuit for two and one-half years Drug Division "Y", where the focus of the court has been on drug treatment as a condition of community sanctions for non-violent offenders, which has had documented success in reducing recidivism by the use of court supervised drug treatment, resulting in a high level of knowledge of this methodology; and...the expense of providing a drug treatment is substantially less than the expense of incarceration . . . .

(Appendix to Petitioner Arencibia's Petition, at Al -2).

Not only does the Order fail to find a legislative directive justifying the creation of the Drug Division, the Drug Division as presently structured is legally unable to fulfill the directives found in the Order's preamble. The Drug Division has been established to hear and try drug trafficking offenses

under § 893.135 Fla. Stat. (1997), which carry minimum mandatory sentences in Florida State prison. The Legislature in establishing minimum mandatory sentences for drug trafficking has clearly indicated its finding that individuals who traffic in large amount of drugs do so for profit and not to feed "their appetite for drugs." Therefore the Drug Division is legally barred by § 893.135 Fla. Stat. (1997) from fulfilling its own directive of attempting to reduce the expenses of incarceration by providing drug treatment to defendants charged with drug trafficking. In fact, the preamble of the Order directly contradicts the legislative directive and intent in § 893.135.

The Order's jurisdictional requirements also excludes misdemeanor drug offenders, who represent a significant portion of the population in need of drug treatment. Thus, the Order's jurisdictional requirements preclude the Drug Division from fulfilling the directives of the Order's preamble.

The Order in the instant case, as the administrative order in Hartley, creates unique jurisdictional requirements for the filing of cases in the respective specialized subject-matter divisions. In Hartley, the administrative order did not track the jurisdictional requirements for habitual felony offenders as found in § 775.084 Fla. Stat. (1997). The administrative order in Hartley created additional jurisdictional requirements not found in § 775.084 governing the filing and transfer of habitual felony offenders cases into the new specialized subject-matter division. In the instant case the Order creates a labyrinth of jurisdictional requirements governing the filing and transfer of cases into the Drug Division. In both cases, but especially so in the instant case, the additional jurisdictional requirements would create undue confusion among attorneys from other jurisdictions.

These issues and concerns could be addressed by the procedures governing a local rule, but cannot be adequately addressed by the issuing of an administrative order. Fla.R.Jud.Admin. 2.050

(e)(1) allows for the participation of the local bar, any interested person and appropriate committees of the Florida Bar. Under a local rule, members of the Florida Bar could comment on the extraordinary jurisdictional requirements of the Order. The local rule procedures would allow interested persons to address the issue of a specialized subject-matter division that has jurisdiction over drug trafficking cases with a minimum mandatory prison sentence, but that also has a directive preferring drug treatment over incarceration.

In Dennis v. State, 673 So.2d 881 (Fla. 1st DCA 1996) the court declared that creation of a "career criminal court" by administrative order was valid because the career criminal court was a section of the circuit courts criminal division and not a division of the circuit court. In support of its holding, the court relied on an unpublished supreme court order finding valid the apparent creation by administrative order of a career criminal division in the Fourth Judicial Circuit. In Re: Administrative Order of the Fourth Judicial Circuit--No. 88-21 (Career Criminal Project), No. 81 ,017 (Fla. Mar. 11, 1993); Administrative Order No. 88-21 (Appendix to Petitioner Arencibia's Petition, at A39).

The Dennis court clearly states that its decision is not in conflict with Hartley when it announces

> we are unable to ascertain whether and to what extent the administrative order by which the Fifteenth Judicial Circuit sought to establish its habitual felony division is similar to Administrative Order No. 88-21 [the administrative order establishing the career criminal court]. In short, we find Hartley unpersuasive in light of the supreme court's holding on this specific issue.

Dennis, 673 So.2d at 882.

Dennis may be distinguished from the instant case in that the court in Dennis and the Supreme Court in its unpublished order may have found legislative preemption in § 775.0841 Fla. Stat. (1995)

of the local rule requirement. § 775.0841 states in pertinent part:

> The Legislature finds a substantial and disproportionate number of serious crimes are committed in Florida by a relatively small number of repeat and violent offenders, commonly know as career criminals. The Legislature further finds that priority should be given to the investigation, apprehension, and prosecution of career criminals in the use of law enforcement resources and to the incarceration of career criminals in the use of available prison space.

It can be argued that the legislative directive in § 775.0841 to identify career criminals and give priority to their prosecution also entails the creation of career criminal courts, thereby preempting the local rule requirement. See In re Report of the Commission on Family Courts, 646 So.2d 178, 18 1 (Fla. 1994). However, in the instant case there is absolutely no legislative directive for the creation of the Drug Division. Furthermore, the Dennis court in distinguishing its holding from Hartley specifically limited its holding to the creation of the career criminal court. Dermis, 673 So.2d at 882.

The Drug Division created by the Order clearly is a specialized division subject to the requirements of Art. V, §§ 7 and 20(c)(10) Fla. Const. and § 43.30 Fla. Stat. (1997). There is no legislative directive permitting courts to create drug divisions. Therefore, the Drug Division must be created, if at all, by a local rule with the approval of this Court. For that reason, the administrative order creating the Drug Division is unconstitutional and the Respondent exceeded his jurisdiction in promulgating the Order.

CONCLUSION

Administrative Order No. S-04-29-97-003 has illegally established a specialized division violative of Art. V, §§ 7 and 20(c)(10) and of § 43.30 Fla. Stat. (1997). The Petitioner Arencibia therefore respectfully requests the Court to enter an order requiring the Chief Judge in and for the Thirteenth Judicial Circuit to set aside the Administrative Order.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of this Initial Brief has been furnished by United States Mail to the Office of the State Attorney, Hillsborough County Courthouse Annex, 800 East Kennedy Boulevard, Tampa, Florida 33602, the Office of the Attorney General, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607, the Honorable F. Dennis Alvarez, Hillsborough County Courthouse, Room 214F, Tampa, Florida 33602, this 4th day of ~~May~~ June, 1997

Richard Escobar, Esquire