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.
_____/

INITIAL BRIEF OF APPELLANTS

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

_____

BILL MCCOLLUM
ATTORNEY GENERAL

Scott D. Makar (FBN 709697)
Solicitor General

Louis F. Hubener (FBN 0140084)
Chief Deputy Solicitor General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3681
(850) 410-2672 (fax)
Counsel for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FLORIDA CONSTITUTION

FLORIDA STATUTES

LAWS OF FLORIDA

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

This appeal is from a final order entered by the Circuit Court in and for Leon County, granting a petition for a writ of quo warranto and enjoining further operation of the Offices of Criminal Conflict and Civil Regional Counsel created by chapter 2007-62, section 4, Laws of Florida. The First District Court of Appeal certified the appeal pursuant to Appellate Rule 9.125 as one requiring immediate resolution, and this Court accepted jurisdiction on January 15, 2007.

Petitioner, the Florida Association of Criminal Defense Lawyers, Inc. ("FACDL"), originally filed the petition in this Court on September 20, 2007. The petition was transferred on October 18, 2007 to the circuit court. See Florida Association of Criminal Defense Lawyers, Inc. v. Crist, Case No. SC07-1744. The petition challenged the appointment of respondents Jeffrey Lewis, Jackson Flyte, Joseph George, Jr., Philip Massa, and Jeffrey Deen to the Office of Criminal Conflict and Civil Regional ("OCCCRCs"). It alleged that chapter 2007-62

> established a second tier of public defender offices to handle criminal conflict cases where a conflict of interest would result from representation by the first, existing tier.

Petition, p. 6 (emphasis added).[1] According to the petition, the OCCCRCs violated article V, section 18, of the Florida Constitution because the Regional Counsel were neither elected nor required to reside in a circuit in which they were elected.

A. Background

In the 2007 session, the Legislature enacted CS/SB 1088, chapter 2007-62, Laws of Florida. The act establishes five Offices of Criminal Conflict and Civil Regional Counsel to be headed by appointed counsel. Each OCCCRC is located within the geographic boundaries of one of the five district courts of appeal. The OCCCRCs are assigned to the Justice Administrative Commission[2] for administrative purposes, but they "are not subject to control, supervision, or direction by the commission in the performance of their duties. . . ." Id. § 4. The five Regional Counsel are appointed to a term of four years by the governor subject to confirmation by the Florida Senate. Id.

The OCCCRCs provide legal representation to certain persons entitled to representation at public expense. This includes indigent persons the public defender is unable to represent because of a conflict of interest or lack of legal

[1] As of the date of filing this brief, counsel for appellants had not received the index to the record. The brief will therefore cite to documents.

[2] Created by section 43.16, Florida Statutes.

authorization. Id. § 1 (amending § 27.48, Fla. Stat.) and § 4 (creating § 27.511(5), Fla. Stat.).

Chapter 2007-62 also expressly provides that the OCCCRCs have primary responsibility for representing persons entitled to court-appointed counsel in civil proceedings, "including, but not limited to § 393.12, and chapters 39, 390, 392, 397, 415, 743, 744, and 984, [Florida Statutes]." Chap. 2007-62, § 4 (creating § 27.511(6)(a), Fla. Stat.). These civil proceedings include, inter alia, child dependency matters, petitions to terminate pregnancies, involuntary commitments for substance abuse, guardianships, etc. When the public defender's office has a conflict of interest, the OCCCRCs must also provide legal services under part I of chapter 394 (the Baker Act), part V of chapter 394 (involuntary civil commitment of sexually violent predators), and chapter 393 (relating to developmental disabilities), Florida Statutes. § 27.511(5)(a), Fla. Stat.

It was the stated intent of the Legislature that criminal and civil representation be provided "in a fiscally sound manner, while safeguarding constitutional principles." Chap. 2007-62, § 4 (creating § 27.511(1), Fla. Stat.). The Legislature expressly found that:

> The creation of offices of criminal conflict and civil regional counsel and the other provisions of this act are necessary and best steps toward enhancing the publicly funded provision of legal representation and

> other due process services under constitutional and statutory principles in a fiscally responsible and effective manner.

Id. § 31.

The OCCCRCs are intended to replace the previous system under which private attorneys were appointed by courts and paid by the state to provide representation. Private counsel may still provide representation if an OCCCRC is unable to do so because of a conflict of interest. Id. § 1 (amending § 27.40(2)(a) & (b), Fla. Stat). Private counsel are paid flat fees prescribed annually in the General Appropriations Act. Id. § 11 (amending § 27.5304, Fla. Stat.). A legislative committee staff analysis report prepared for the bill stated that this new system was expected to save the state $9.7 million in fiscal year 2007-08 and $18.8 million in fiscal year 2008-09. See March 28, 2007 Professional Staff Analysis for CS/SB 1088. (App. B, p. 6). The Legislature appropriated $29.4 million in general revenue funds for the five OCCCRCs for fiscal year 2007-2008. Chapter 2007-62, § 4, Laws of Florida.

Chapter 2007-62 was approved and signed into law by Governor Crist on May 24, 2007. Thereafter, the Governor appointed appellants Jeffrey Lewis, Jackson Flyte, Joseph George, Jr., Philip Massa, and Jeffrey Deen as criminal conflict and civil regional counsel ("Regional Counsel") for their respective regions.

B. Proceedings in the Circuit Court

The petition for writ of quo warranto sought to enjoin the Regional Counsel from providing representation to indigent persons on the ground that they were "second tier public defender offices." Petition, p. 6.[3] The petition mentioned in passing that the OCCCRCs were authorized "to represent indigent clients in certain civil proceedings," Petition p. 3, but said nothing more about them, did not identify those proceedings, and in no way challenged the legal authority of the OCCCRCs to provide such representation.

As support for its contention that the OCCCRCs were "second tier public defender offices," FACDL relied on the amendment to section 29.001, Florida Statutes, relating to funding the OCCCRCs. Pursuant to article V, section 14(c) of the Florida Constitution, counties have certain limited funding responsibilities for the trial courts, public defenders' offices, state attorneys, and clerks of court. Section 16 of chapter 2007-62, amended section 29.001, Florida Statutes, to define the offices of public defenders to include the OCCCRCs for purposes of receiving limited county funding:

[3] The Petition also set forth as a "policy argument" that Regional Counsel could not as a matter of law provide adequate counsel to indigents because they were not elected to their offices, and therefore chapter 2007-62 violated the Sixth Amendment right to effective assistance of counsel. FACDL did not pursue this argument at the hearing, and the trial court did not address it.

> **29.001 State courts system elements and definitions.**
> (1) For the purpose of implementing s. 14, Art. V of the State Constitution, the state courts system is defined to include the enumerated elements of the Supreme Court, district courts of appeal, circuit courts, county courts, and certain supports thereto. The offices of public defenders and state attorneys are defined to include the enumerated elements of the 20 state attorneys' offices and the enumerated elements of the 20 public defenders' offices and five offices of criminal conflict and civil regional counsel. Court-appointed counsel are defined to include the enumerated elements for counsel appointed to ensure due process in criminal and civil proceedings in accordance with state and federal constitutional guarantees. Funding for the state courts system, the state attorneys' offices, the public defenders' offices, the offices of criminal conflict and civil regional counsel, and other court-appointed counsel shall be provided from state revenues appropriated by general law.

See also ch. 2007-62, § 19 (amending section 29.008, Fla. Stat., and providing for limited county funding of OCCCRCs). It is not known how much the counties would contribute to the OCCCRCs on a yearly basis. See Professional Staff Analysis (App. B, p. 6).

The petition did not explicitly challenge the constitutionality of the county funding requirement, and at the hearing before the circuit court FACDL disclaimed any intent to do so.[4] FACDL merely asserted that section 29.001 was evidence

[4] The appellants' response in opposition in the trial court asserted that FACDL had no standing to question the counties' responsibility for funding. The hearing was not reported but

that Regional Counsel were "second tier public defenders" and in violation of article V, § 18 because they were not elected or required to reside in a circuit they represented. Petition, p. 7 (¶¶ 14-22). FACDL relied principally on this Court's decision in Bush v. Holmes, 919 So. 2d 392 (Fla. 2006), which held that the Opportunity Scholarship Program violated article XI, section 1(a) of the Florida Constitution because it authorized an alternative school system.

Because the petition presented no challenge to the OCCCRCs' duty to provide representation in civil proceedings, appellants responded to the only two issues presented: **i)** whether the Regional Counsel were public defenders, and **ii)** whether the rights of indigents' to adequate representation under the Sixth Amendment were violated. See Response In Opposition To Petition For Writ of Quo Warranto.

Appellants asserted that the Regional Counsel could not be considered "public defenders" under article V, section 18 because they do not perform any duties that public defenders are required to perform. Public defenders cannot provide representation to persons when there is a conflict of interest. Thus, when an OCCCRC represents a criminal defendant, it does

---

FACDL's counsel represented to the trial court that they were not challenging the funding mechanism of the act, and the court's order granting the writ stated it was not considering any such issue. Order p. 4.

not provide representation that a public defender is authorized to provide. Further, appellants contended that chapter 2007-62 created no alternative system such as the one this Court found invalid in Bush in that the establishment of the Regional Counsel does not conflict with or affect the operation of the statewide system of public defenders' offices; all 20 public defenders remain elected and reside in the circuit they represent. Because nothing in the Florida Constitution restricted the authority of the Legislature to create the OCCCRCs, they were constitutional.

The trial court adopted the argument of FACDL, ruling that chapter 2007-62 could not alter the requirement of article V, section 18 that a public defender "be elected and reside in the territorial jurisdiction of his or her respective circuit. . . ." Order, p. 6. It characterized the OCCCRCs as a "hybrid" agency because counties were required to provide partial funding. Id. Notwithstanding the fact that the petition had not challenged the OCCCRCs' authority to provide representation in civil cases, the trial court enjoined the Regional Counsel from performing any of the duties of that office, criminal or civil. Id., p. 7. In light of FACDL's pleadings and the appellants' response, the trial court was not unaware of the significant civil responsibilities that chapter 2007-62 imposed upon the OCCCRCs. Its order granting the writ

explicitly recognized the OCCCRCs' "primary responsibility for providing representation in civil proceedings." Order, p. 3. Nonetheless, it enjoined OCCCRC from providing representation in civil cases. Appellants immediately filed a notice of appeal to avail themselves of the automatic stay. See Rule 9.310(b)(2), Fla. R. App. P.

STANDARD OF REVIEW

A trial court decision on the constitutionality of a statute presents a pure issue of law, and accordingly is reviewed de novo. Zingale v. Powell, 885 So. 2d 277 (Fla. 2004). "When a court has declared a state statute unconstitutional, the reviewing court must begin the process with a presumption that the statute is valid." St. Vincent's Medical Center, Inc. v. Memorial Healthcare Group, 967 So. 2d 794, 799 (Fla. 2007)(citing Dep't of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So. 2d 879, 881 (Fla. 1983)). All doubts as to the validity of a statute are resolved in favor of its constitutionality. Dep't of Legal Affairs v. Rogers, 329 So. 2d 257, 263 (Fla. 1976).

SUMMARY OF THE ARGUMENT

The OCCCRCs are not public defenders. They provide representation in criminal cases only when the public defender, because of a conflict of interest, cannot. The OCCCRCs therefore do not constitute an impermissible alternative system, such as was found in Bush v. Holmes, 919 So. 2d 392 (Fla. 2006), that displaces, competes with, or affects the public defenders' offices. Hence, the principle "expressio unius est exclusio alterius" does not apply, and the creation of the OCCCRCs does not offend article V, section 18 of the Florida Constitution.

The fact that counties may be required to provide limited funding to OCCCRCs changes neither the character of those offices nor their limited responsibility for criminal cases. FACDL did not challenge the constitutionality of the funding arrangement, the trial court did not consider that question, and it is not before this Court for review. Accordingly, FACDL has not met its heavy burden to demonstrate beyond a reasonable doubt that any part of chapter 2007-62 is invalid.

FACDL also contended as a "policy" matter that the Sixth Amendment right to effective assistance of counsel will be impaired because the Regional Counsel are appointed, not elected. Neither evidence nor case law supported this

contention, FACDL did not argue it at the hearing, and the trial court's order properly ignored the claim.

Finally, even if the establishment of the OCCCRCs' to provide representation in criminal cases is unconstitutional, it is severable from the remainder of chapter 2007-62, which authorizes OCCCRCs to provide representation in civil cases. This responsibility is separable from other provisions, and the overall purpose of the act--to limit the use of private counsel and reduce costs to the state--can still be served. Chapter 2007-62 contains a severability clause and courts have inherent authority under separation of powers principles to save all valid portions of a legislative act.

ARGUMENT

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

The legal character of the OCCCRCs depends on what they do, not on how they might be funded. In criminal matters the obvious purpose of the OCCCRCs is to provide legal representation when the public defender cannot fulfill that obligation because of a conflict of interest. Chapter 2007-62, § 4, Laws of Florida (creating § 27.511(5), Fla. Stat.). The OCCCRCs simply constitute an available pool of attorneys who are no more "public defenders" than are private counsel who might be appointed in conflict cases.

FACDL contends, however, that OCCCRCs are "simply public defenders by a different name" and therefore chapter 2007-62 is invalid because, contrary to article V, section 18, the Regional Counsel are not elected or required to reside in a circuit in which they are elected. FACDL finds support for this argument only in the amended section 29.001(1), which provides that "for purposes of implementing article V, section 14," the offices of public defenders "are defined to include . . . the enumerated elements of the 20 public defenders' offices and five offices of criminal conflict and civil regional counsel." § 29.001(1), Fla. Stat. (as amended by ch. 2007-62, § 16). Article V, section 14 of the Florida Constitution is entitled "Funding" and requires limited county funding for the court system, including the public defenders' offices.

Requiring the counties to participate in funding the operation of the OCCCRCs in no way creates a substitute or alternative public defender system. The OCCCRCs provide representation only when the public defenders cannot. The trial court's (and FACDL's) reliance on article V, section 18 and Bush v. Holmes, 919 So. 2d 392 (Fla. 2006), for their contrary argument is entirely misplaced. In Bush, this Court concluded that the Opportunity Scholarship Program violated article XI, section (1)(a) of the Florida Constitution because it devoted "the state's resources to the education of children within our

state through means other than a system of free public schools." Id. at 407. The uniformity requirement of article XI, section (1)(a), the Court held, embodied "both a mandate to provide for children's education and a restriction on the execution of that mandate." Id. at 406. That constitutional provision required that the state provide "a uniform, high quality system of free public education." It did not "authorize additional equivalent alternatives." Id. at 408.

In contrast, article V, section 18 does not mandate that public defenders shall provide representation for all indigent criminal defendants regardless of conflicts of interest.[5] In authorizing representation by OCCCRCs only in criminal cases in which there is a conflict of interest, Chapter 2007-62 does not create a parallel system of unelected public defenders that competes with the existing system of public defenders. Unlike the public school system in Bush, the public defenders' offices remain unaffected by the enactment; they lose nothing to the OCCCRCs. As prescribed in article V, section 18, there is still an elected public defender in each circuit who performs duties "prescribed by general law" and who is permitted to hire

[5] As pointed out, FACDL has at no time asserted article V, section 18 or any other constitutional provision precludes the assignment of civil cases to the OCCCRCs. That would be untenable. Article V, section 18 states that public defenders "shall perform duties prescribed by general law." Clearly, the Legislature may in its discretion assign civil cases to the OCCCRCs.

assistants. The OCCCRCs do not function in such circumstances as "additional equivalent alternatives" to public defenders. See Bush, 919 So. 2d at 408. The principle of construction on which the Court relied in Bush -- expressio unius est exclusio alterius -- therefore has no application here.

In paragraph 13 of its petition, FACDL contended that

> [o]nly by defining OCCCRCs as public defender offices could the legislature save money on the new offices by requiring the counties to pay for their infrastructure. Said another way, were the OCCCRCs not public defender offices, section 29.001(a) would violate Article V, section 14(a) and (c) of the Constitution.

Petition, p. 7. Requiring the counties to participate in funding the OCCCRCs changes neither the function nor the legal character of those offices. The issue of whether the counties may be compelled to provide funding for the OCCCRCs under article V, section 14(c) is one that FACDL did not argue in the petition and expressly declined to pursue at the hearing. The trial court did not address it. Order, p. 4.[6]

FACDL's argument does not begin to meet its heavy burden of proving that the OCCCRCs violate article V, section 18 of the Florida Constitution. It is well-established that "an act will not be declared unconstitutional unless it is determined to be

[6] Although the trial court's final order said the unconstitutionality of the funding mechanism was "asserted," Order, p. 4, that was clearly not the theory of the petition. As noted, FACDL disclaimed any such challenge.

invalid beyond a reasonable doubt." Burch v. State, 558 So. 2d 1,3 (Fla. 1990). And further, "[i]f it is reasonably possible to do so, a court is obligated to interpret statutes in such a manner as to uphold their constitutionality." Michelson v. State, 927 So. 2d 89, 892 (Fla. 4th DCA 2005).

FACDL has, at most, identified a funding issue that is unrelated to the question of whether the Legislature has the authority to establish a system of Regional Counsel. It has not shown, or even attempted to show, that the OCCCRCs are an alternative public defender system comparable to the Opportunity Scholarship Program at issue in Bush v. Holmes. Nor has it demonstrated, or attempted to demonstrate, that any provision of the Florida Constitution denies the Legislature the power to create the OCCCRCs and assign them criminal conflict and civil cases. Because nothing in the Florida Constitution requires that OCCCRCs be subject to the provisions of article V, section 18, the Legislature's authority is plenary:

> The Constitution of this state is not a grant of power to the Legislature, but a limitation only upon legislative power, and unless legislation be clearly contrary to some express or necessarily implied prohibition found in the Constitution, the courts are without authority to declare legislative Acts invalid. The Legislature may exercise any lawmaking power that is not forbidden by organic law.

Chiles v. Phelps, 714 So. 2d 453, 458 (Fla. 1998) (citations omitted). The establishment of the OCCCRCs is within the Legislature's plenary authority, and these offices are clearly constitutional.

Finally, it should be noted that FACDL has ignored the strong interest of the Legislature in controlling the cost to the state of appointing private counsel in all criminal conflict cases and civil cases in which persons are entitled to appointed counsel. As shown, the Legislature anticipates significant savings as a result of the enactment of chapter 2007-62. That is not a minor consideration. Members of this Court have noted that "[t]here are examples where, in noncapital cases, attorney's fees paid to private counsel have exceeded the annual salary for beginning public defenders." In re Public Defender's Certification of Conflict and Motion to Withdraw Due to Excessive Caseload, 709 So. 2d 101, 105 (Fla. 1998) (Overton, J., joined by Wells, J., concurring). While then-Justice Overton suggested creation of a separate conflict division within existing public defenders' offices, he did not contend (nor does FACDL) that such an arrangement is constitutionally mandated. Indeed, under FACDL's espoused theory, such a "second tier" public defender would violate article V, section 18. A separate conflict division would be questionable for other reasons. See Fla. Atty. Gen. Op. 065-15 (February 17, 1965)

(stating that a special assistant public defender may not be appointed to represent a defendant whom the public defender cannot represent because of a conflict of interest).

In any event, the Legislature, in the exercise of its plenary constitutional authority, has decided the OCCCRCs will provide representation in criminal conflict cases. FACDL's arguments have not met the heavy burden of proving the OCCCRCs unconstitutional. Accordingly, the decision of the trial court must be reversed.

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

FACDL also contended in its petition that because the OCCCRCs are not elective offices the Regional Counsel do not enjoy the same independence as court-appointed private counsel, and therefore the Sixth Amendment right to effective assistance of counsel is somehow impaired.

This argument fails for a number of reasons. First, FACDL has cited no case, and appellants have found none, that stands for the proposition that counsel for criminal defendants must be either elected or court-appointed in order to meet the Sixth Amendment requirement for effective representation. If this were true, all capital collateral regional counsel, see chapter 27, part IV, Florida Statutes, would be unconstitutional as they are not elected or court-appointed. FACDL's assumption –- that

the Regional Counsel will violate their ethical duties –- is unsupported and unwarranted. FACDL did not argue this point at the hearing below, and the trial court did not address it in its written order.

In any case, it is well-established that a claim of ineffective assistance of counsel is analyzed under a two-prong test: whether the trial counsel's performance was deficient and whether that deficiency deprived the defendant of a fair trial. Carratelli v. State, 961 So. 2d 312, 320 (Fla. 2007) (citing Strickland v. Washington, 466 U.S. 668 (1984)); see also Wiggins v. Smith, 539 U.S. 510 (2003) (affirming Strickland test). Other than to assert that Regional Counsel are neither elected nor appointed by the courts, FACDL failed to adduce either evidence or case law showing their independence would be impaired to such an extent as to meet the Strickland test.

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

Appellants submit that if the OCCCRCs are deemed an unconstitutional alternative to the public defenders' offices, their responsibility for criminal conflict cases may be severed from chapter 2007-62 and the remaining provisions of that act allowed to stand. This is an important question because FACDL has asserted that the trial court's final order effectively

declared chapter 2007-62 invalid in its entirety, thereby reviving the prerogative of trial courts to appoint private counsel to all cases that would be handled by the OCCCRCs and, presumably, to pay counsel court-determined fees rather than those prescribed by the act. FACDL has further asserted that appellants have waived a severability argument by not raising it in the trial court. FACDL is wrong.

First, the trial court's order granting the writ of quo warranto did not declare chapter 2007-62 invalid in its entirety. Rather, it enjoined the Regional Counsel from performing any of their duties, civil or criminal, without any question having been raised as to the constitutionality of their responsibilities for civil cases. The trial court did not consider whether the valid provisions of chapter 2007-62 could be severed from those it deemed invalid or opine on the reach of its holding.

Second, appellate courts have inherent authority to preserve the constitutionality of legislative enactments regardless of whether severability is raised at the trial court level. "Severability is a judicial doctrine recognizing the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions." Ray v. Mortham, 742 So. 2d 1276, 1280 (Fla. 1999) (emphasis added). The doctrine is "derived

from the respect of the judiciary for the separation of powers, and is 'designed to show great deference to the legislative prerogative to enact laws.'" Id. (quoting Schmitt v. State, 590 So. 2d 404, 415 (Fla. 1991)). This Court has inherent authority to preserve the constitutionality of an act by the elimination of invalid portions. State v. Rubio, 967 So. 2d 768, 775 (Fla. 2007); Small v. Sun Oil Company, 222 So. 2d 196, 199 (Fla. 1969).

Appellants have not found a single appellate decision in this state holding that severability must be raised in the trial court or forever waived. Ray v. Mortham indicates that severability may be raised for the first time on appeal. Ray involved a challenge on federal constitutional grounds to a 1992 amendment to the Florida Constitution prescribing term limits for various elected state and federal office holders. The complaint challenged the amendment only as it applied to state legislators. It appears that only the constitutional issue, not severability, was argued in the trial court. 742 So. 2d at 1280. On appeal, the plaintiffs argued for the first time that none of the provisions of the amendment could be severed. This Court placed the burden on the challenging parties to show that the amendment was not severable, id. at 1281, and ultimately rejected their arguments.

In numerous other cases this Court has considered whether invalid portions of legislative enactments may be severed without that issue having been raised in the lower courts. See, e.g., St. Johns County v. Northeast Builders Ass'n, 583 So. 2d 635 (Fla. 1991); Schmitt v. State, 590 So. 2d 404 (Fla. 1991); Smith v. Dep't of Insurance, 507 So. 2d 1080 (Fla. 1987); Harris v. Bryan, 89 So. 2d 601 (Fla. 1956). Moreover, appellate courts have considered severability sua sponte. See Rubio v. State, 967 So. 2d at 775; Knealing v. Puleo, 675 So. 2d 593, 596 n. 6 (Fla. 1996); State v. Lee, 356 So. 2d 276 (Fla. 1978); Bush v. Holmes, 886 So. 2d 340, 346 n. 4 (Fla. 1st DCA 2004) (on motion for rehearing en banc).

Severability is not in the nature of a defense that should be raised pursuant to Rule 1.140, Florida Rules of Civil Procedure. Indeed, to raise it in that vein, particularly where the constitutional argument is weak, might well be perceived as a concession of invalidity. Given the fundamental obligation to uphold statutes whenever possible, this Court should exercise its power to sever only the unconstitutional portions of chapter 2007-62.[7]

[7] This Court's comments in Richardson v. Richardson, 766 So. 2d 1036, 1040 n. 4 (Fla. 2000), do not support FACDL's waiver argument. In footnote 4 the Court stated that severability had not been raised in the district court below, and therefore was not properly preserved. The Court then proceeded to address and

The test for severability, as stated in Ray v. Mortham, is:

> When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

742 So. 2d at 1281 (quoting Smith v. Dep't of Insurance, 507 So. at 1089 (Fla. 1987)). Chapter 2007-62 contains a severability clause. Id. § 33.[8] This legislatively expressed preference, although not binding, is "highly persuasive." St. Johns County v. Northeast Florida Builders Ass'n, Inc., 583 So. at 640.

Chapter 2007-62 is comprehensive legislation addressing the need for legal services that must be provided at government

---

reject the severability argument on its merits. Here, the First District Court of Appeal did not review the decision below.

[8] The severability clause provides:

> If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Chapter 2007-62, § 33, Laws of Florida.

expense to indigent persons entitled to legal counsel in certain types of cases because of constitutional or statutory requirements. As discussed, the act provides for representation by the OCCCRCs in criminal cases, but only where the public defender has a conflict of interest, and in a variety of civil proceedings.[9] The act also provides for appointment of private counsel when the OCCCRC is unable to provide representation. Id. § 1 (amending § 27.40(2)(a) & (b), Fla. Stat.). It requires that private counsel be appointed from a registry and that they be willing to abide by the terms of a contract with the Justice Administrative Commission. If no registry counsel can be appointed in a case, then the court may appoint other private counsel. Appointed private counsel, whether on the registry or not, are compensated pursuant to section 27.5304, Florida Statutes, as amended. Remaining provisions of chapter 2007-62 relate to funding and various administrative matters, and numerous statutes are modified to reflect that representation will be provided by the OCCCRCs.

The OCCCRCs' responsibilities for civil cases are clearly severable under the criteria of Smith v. Dep't of Insurance. Under the first prong of the Smith test, the OCCCRCs' civil responsibilities are separate and distinguishable from their authorization to provide criminal representation. One can stand

[9] See § 27.511(5)(d) and (6)(a), Fla. Stat.

without the other. Under the second prong, the legislative purpose--to provide representation in tens of thousands of civil cases across the state and limit the compensation of appointed private counsel in civil and criminal cases--can be accomplished independently of the provisions making OCCCRCs responsible for criminal conflict cases.

The third prong addresses "whether the valid and invalid features are so inseparable in substance that it can be said [the legislature] would not have passed the one without the other." Ray v. Mortham, 742 So. 2d at 1283. FACDL bears the burden of proof on this prong. Id. In this regard, the severability clause is "highly persuasive" of the fact that the Legislature intended to save all valid portions of the act. St. Johns County v. Northeast Florida Builders Ass'n, Inc., 583 So 2d at 640; see also Ray v. Mortham, 742 So. 2d at 1283; Smith v. Dep't of Insurance, 507 So. 2d at 1090.

The Legislature clearly intended, inter alia, to centralize civil cases in the OCCCRCs and to limit both the use of appointed private counsel and their fees. FACDL cannot credibly argue the contrary, nor could it demonstrate that these measures would not by themselves effect savings. Such an argument would have to be rejected out of hand because the Legislature intends to monitor the program for three years, evaluate the legal services provided, and decide whether any revisions are needed.

Chap. 2007-62, § 31. If the program is not cost effective, it is unlikely to survive in its present form. But that is a decision for the Legislature, not an argument for FACDL. The third prong of the severability test is easily met.

There can be little dispute about the fourth prong--whether an act complete in itself remains after the invalid provisions are stricken. The OCCCRCs can provide representation in all the civil cases designated in section 27.511(6)(a). Their authority to do so is uncontested. The other remaining unchallenged provisions concern payment of private counsel appointed in criminal and civil cases. Taken together, these clearly effectuate the Legislature's purpose--to reduce the cost of conflict counsel. Therefore, even if the OCCCRCs' responsibility for criminal conflict cases is severed, an act complete in itself remains.

CONCLUSION

The decision of the trial court should be reversed.

In the event this Court finds the OCCCRCs in violation of article V, section 18 of the Florida Constitution, however, it should sever those provisions of chapter 2007-62 authorizing the OCCCRCs to provide representation in criminal cases.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

Scott D. Makar (FBN 709697)
Solicitor General

_____
Louis F. Hubener (FBN 140084)
Chief Deputy Solicitor General
Office of the Attorney General
The Capitol - PL-01
Tallahassee, FL 32399-1050
(850) 414-3681;
(850) 410-2672 (fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by U.S. Mail and facsimile transmission this 25th day of January, 2008 to:

Sonya Rudenstine
1221 N.E. 3rd Street
Gainesvile, Florida 32601

Todd Doss
725 S.E. Baya Drive
Suite 102
Lake City, Florida 32025

_____
Attorney

CERTIFICATE OF COMPLIANCE

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.

_____
Attorney