IN THE SUPREME COURT OF FLORIDA

ALEX SINK,
CHIEF FINANCIAL OFFICER, ETC.

Petitioners,

vs.

ROBERT M. ERVIN, ET AL.

Respondents.

_____/

CASE NO: SC10-1319/ SC10-1317

1st DCA Case No.: 1D10-2978/1D10-2972

Lower Tribunal No.: 2009-CA-001386

INITIAL BRIEF OF PETITIONER CHIEF FINANCIAL OFFICER ALEX SINK

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TABLE OF CONTENTS

TABLE OF CITATIONS AND OTHER AUTHORITIES

Cases **Page**

Constitution and Statutes

Other Authorities

PRELIMINARY STATEMENT

The following signals and abbreviations will be used in this Initial Brief:

Petitioner Chief Financial Officer Alex Sink will be referred to as "CFO Sink." Any other Petitioner will be referred to as "Petitioner" and his or her name and title. Respondents Robert M. Ervin and Davisson F. Dunlap, Jr., will be referred to collectively as "the Plaintiffs."

All references to the Record On Appeal will be signaled by "R-" in parentheses followed by the page number or numbers shown on the Index to the Record On Appeal for the document to which reference is made. Because the transcript of the November 18, 2009, injunction hearing was not separately numbered in the Record On Appeal, references to that transcript will be signaled by "R-TR-" in parentheses followed by the page number of the transcript to which reference is made. A copy of Defendants' Exhibit 1, admitted into evidence at the November 18, 2009, hearing, is attached as Appendix 1. No other document is included in the Appendix.

Unless otherwise indicated, all references to Florida Statutes are to Florida Statutes (2009). Reference to the General Appropriations Act is signaled by "GAA."

STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal from an order of the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, rendered on June 4, 2010. The order granted a summary judgment declaring that portions of the State's civil filing fee statutes were unconstitutional and void. This determination directly affects the constitutional responsibilities of the Chief Financial Officer as the State's chief fiscal officer and the duties of the office under Chapters 17, 215, and 216, Florida Statutes.

The matter commenced on March 16, 2009, when Robert M. Ervin and Davisson F. Dunlap, Jr., ("the Plaintiffs") filed with the Supreme Court of Florida a petition styled "Application for Writ of Quo Warranto and in the alternative, Writ of Mandamus and in the Alternative Application for Constitutional Writ and all Writs Necessary to Enjoin Respondents from Engaging in Continuing Unconstitutional Ultra Vires Actions" ("the Application"). (R-17-65) The Application named as Respondents a panoply of State officers and entities, including the entire Florida Legislature; the President of the Senate; the Speaker of the House; the Florida Cabinet and all its members individually, including Governor Charlie Crist, Attorney General Bill McCollum, Chief Financial Officer Alex Sink, and Commissioner of Agriculture Charles Bronson; the Florida Clerks of Court Operation Corporation ("FCCOC") and its entire Executive Council ; the

Florida Association of Court Clerks, Inc.("FACC"); the Department of Revenue; and a party that was not *sui juris*, the Clerk of the Courts Trust Fund. (R-17-18). The Application sought the issuance of writs against all respondents (including the trust fund) "to enjoin them from engaging in continuing ultra vires unconstitutional actions" and a declaration that the court-related funding statutes for clerks of court through the FCCOC were unconstitutional because filing fees paid by the Plaintiffs were being "ministerially diverted" to the General Revenue Fund and therefore denied them access to courts by denying them "expected court services." (R-33-61).

The Supreme Court did not pass on the merits of the Application. By order entered April 8, 2009, the Court transferred the Application to the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, for further proceedings. (R- 15-16). On May 4, 2009, Circuit Judge Frank E. Sheffield of the Second Judicial Circuit issued an alternative Writ of Quo Warranto to the Respondents directing them to show cause why the relief requested in the Application should not be granted. On May 20, 2009, separate responses to the alternative writ were filed by CFO Sink, the FACC, Inc., and the FCCOC; the Attorney General filed a response on behalf of all other State respondents. (R-107-249). CFO Sink moved to discharge the writ, alleging that the Application contained no allegations that she had done anything sounding in quo warranto;

alleging that the Application was actually seeking declaratory relief; and suggesting that pending changes in law with respect to clerk of court budgets would moot the claims of the Application as to the alleged unconstitutionality of Sections 28.35-37, Florida Statutes (2008) (R- 201-223).

On June 17, 2009, the Plaintiffs filed a motion seeking leave to file an "Amended Petition for Writ of Quo Warranto and in the Alternative, Writ of Mandamus and in the Alternative Declaratory Judgment;" a copy of a proposed amended petition was attached . (R-264-313). On August 31, 2009, a hearing was held on motions before Judge Sheffield. On September 10, 2009, Judge Sheffield entered an order granting the Plaintiffs leave to file an amended petition. (R-1187-1188). On September 18, 2009, the Plaintiffs filed an amended petition, styled "First Amended Application for Writ of Quo Warranto and in the alternative, Writ of Mandamus and in the Alternative Complaint for Declaratory and Injunctive Relief." ("the First Amended Application") (R- 1193-1332). (The amended petition attached to the Plaintiffs' original motion was never served on the Defendants.) The First Amended Application dropped several parties previously named as respondents in the Application, including the Florida Legislature and its presiding officers; the FCCOC; and the Florida Association of Court Clerks, Inc. It added as respondents the four members of the Justice Administrative Commission ("the JAC"), both in their capacities as members of the JAC and in

their official capacities as State Attorneys (Jerry Hill and Bradley King) and Public Defenders (Dennis Roberts and Diamond R. Litty). The style of the action thereafter was Ervin et al. v. Crist et al., although no specific order amending the style was issued.

The First Amended Application no longer sought any relief as to the Florida Legislature, but continued to demand the issuance of extraordinary writs against the respondents, including CFO Sink and the trust fund, as well as against clerks of court who were not parties to the action. (R-1200). The specific relief requested by the First Amended Application was a declaration that Sections 25.241, 27.562, 28.24, 28.241, 34.041, and 35.22, Florida Statutes (2009) were "unconstitutional on their face and as applied" to the Petitioners "as a denial of rights to access the courts guaranteed by Article I, Section 21, denial of the right to adequate funding of the state court system under Article V, Section 14, and denial of the rights listed above in Paragraph 1 as an illegal tax[sic]." Also requested was that the court: "[e]njoin the ultra vires unconstitutional sweep to General Revenue of these court "user fees." The request for relief also included a request for no relief, asking the court to "[e]nter no order prohibiting or limiting the Florida Legislature in any manner whatsoever from lawfully appropriating the "user fees" in its unbridled, unfettered, discretion and ultimate wisdom in the General Appropriations Act (GAA)." (R-1197-1198).

On October 12, 2009, CFO Sink filed a motion to dismiss the First Amended Application, (R- 1342-1356). On October 14, 2009, all other Defendants filed a motion to dismiss that adopted the CFO's motion and arguments. (R- 1357-1359). On October 23, 2009, the Plaintiffs filed a motion styled "Petitioners/Plaintiffs' Motion For A Temporary Injunction And In The Alternative Writ Of Mandamus And/Or Quo Warranto To Prevent Diversion Of Court Filing Fees To General Revenue and Memorandum Of Law In Support." (R-1360-1505). On November 18, 2009, an evidentiary hearing was held before Judge Sheffield at which all three motions were heard. A transcript of the hearing is included separately in the Record On Appeal.

At the hearing, counsel for CFO Sink asserted that there was no basis for a conclusion that filing fee proceeds deposited into the General Revenue Fund were being used for matters other than the administration of justice and asserted that the trial court would have no basis for an injunction against the deposit of filing fee proceeds into the General Revenue Fund without finding the filing fee statutes unconstitutional on their face. (R-TR-6-7). Counsel also indicated that CFO Sink did not contest that money was being collected by clerks of court and transmitted to the Department of Revenue for deposit into the General Revenue Fund. (R-TR-11) At the CFO's request, the trial court took official recognition, based on Defendants' Exhibit 1, a summary of appropriations, of how much money from the

General Revenue Fund was appropriated in the 2009-2010 GAA, Chapter 2009-81, Laws of Florida, to support the administration of justice: for Justice Administration: $630 million; and for the Judicial Branch: $135 million; for a grand total of $765 million. (R-TR-110-113; 126-127; Appendix, at 1.)

No injunction was ordered from the bench. No order granting or denying the requested injunction was ever issued. On December 9, 2009, CFO, in accordance with leave granted on the record at the evidentiary hearing of November 18, 2009, filed with the court a copy of the Executive Summary of the November 16, 2009, Article V Revenue Estimating Conference and a tabulation of the estimates produced by the Conference showing that for FY 2009-2010, the Conference estimated that a total of $200.6 million dollars would be received by the General Revenue Fund from court-related revenues (R- 1542); and that no money would be transferred to the General Revenue Fund from the Clerks of the Court Trust Fund. (R-1542). See Defendant's Exhibit 3 (R-1533-1542).

By order dated December 8, 2009, Judge Sheffield dismissed Petitioners' First Amended Application's counts seeking writs of quo warranto and mandamus against the Respondents with leave to amend. No subsequent amended writ petition was ever filed. The motions to dismiss of the Respondents were denied as to the declaratory judgment counts of the First Amended Application, and the Respondents were ordered to answer these counts within 20 days. (R- 1543). On

December 28, 2009, CFO Sink filed "Defendant Chief Financial Officer Sink's Answer to Plaintiffs' First Amended Complaint for Declaratory Judgment." (R-1544-1554). On the same day, an Answer for all Defendants other than CFO Sink was also filed. (R- 1555-1562).

On March 9, 2010, Plaintiffs filed a 101 page Motion for Summary Judgment. (R-1586-1687). The motion was accompanied by an appendix of 725 pages. (R-1688-2413). By Notice of Hearing dated March 22, 2010, a hearing on the Motion for Summary Judgment before Judge Sheffield was set for April 19, 2010. On April 15, 2010, CFO Sink filed her Response in Opposition to Plaintiffs Motion for Summary Judgment. (R-2414-2431). On April 19, 2010, a Notice of Adoption of the CFO's Response was filed on behalf of all other Defendants. (R-2432-2433).

A hearing was held on the Motion for Summary Judgment on April 19, 2010. No transcript was taken of the hearing. On June 4, 2010, Judge Sheffield entered his Order Granting Summary Judgment. (R-2434-2449).

On June 4, 2010, CFO Sink filed a Notice of Appeal of the Order Granting Summary Judgment. (R-2468-2486). This appeal was docketed as First DCA Case No. 10-2978. That same day, a Notice of Appeal of the order was also filed on behalf of all other Defendants. (R-2450-2467). This appeal was separately

docketed as First DCA Case No. 10-2972. By motion filed June 11, 2010, CFO Sink moved to consolidate both appeals before the District Court of Appeal.

By motion served June 10, 2010, the Plaintiffs moved the District Court to transfer the appeal in Case No. 10-2972 to the Supreme Court of Florida. Also on that date, Plaintiffs served a motion styled "Suggestion By Appellees for the Court to certify the Issues and Exercise "Pass Through" Jurisdiction." By companion orders dated July 7, 2010, the District Court certified that both appeals required immediate resolution by the Supreme Court of Florida. Plaintiffs' motion was denied. The motion to consolidate and other motions were deferred to the Supreme Court in the event it accepted jurisdiction of the appeals.

By Order dated July 22, 2010, this Court accepted jurisdiction, consolidated both appeals for all appellate purposes, and ordered a briefing schedule. This appeal ensued.

SUMMARY OF THE ARGUMENT

The order on review ignored the existence of disputed issues of material fact. It is settled that the merest possibility of the existence of a genuine issue of material fact precludes summary judgment. The order on review is based on an unsupported factual predicate that was disputed categorically by the Respondents: that any monies deposited into the General Revenue Fund of the State Treasury will not be used, are not being used, and cannot ever be used to support the administration of justice in Florida. The order on review also rejected the existence of a dispute concerning the size and source of the amount of appropriations made from General Revenue in support of the administration of justice by the FY2009-2010 GAA, erroneously presuming that all such funds were spent on "unrelated governmental activities."

Since 1977, Section 28.241, Florida Statutes, has continuously required that a portion of each civil filing fee be deposited into the General Revenue Fund. The Court has never issued an opinion criticizing, let alone invalidating, this requirement. No provision of the Florida Constitution prohibits the Legislature from requiring the deposit of some or all of the proceeds of civil filing fees into the General Revenue Fund of the State Treasury.

The order on review errs by treating where in the State Treasury funds are initially deposited as a proxy for the Legislature's ultimate decision of where to

direct the funds via appropriation. Prohibiting the deposit of certain court-related monies in the General Revenue Fund cannot compel the Legislature to fund the administration of justice at an optimal level. If the constitutional evil to be remedied is the underfunding of the state court system, judicial prescription of how the State accounts for its revenues is not an effective method by which to control the size of appropriations for the judicial branch.

Once a dollar is deposited in the State Treasury, it retains no separate identity based upon where it was collected. Money is fungible, and, once commingled, it loses its separate character. The challenged statutes do not designate where money is to be spent and do not in any way prohibit any part of the General Revenue Fund balance from being spent on the costs of the administration of justice today. More is being spent from General Revenue on the costs of the administration of justice than is being taken into the Fund from courthouse collections. Consequently, a set of circumstances exists that demonstrates that the challenged statutes are not facially unconstitutional. Because all the moneys deposited into General Revenue are being used to pay the costs of "the court systems," the order's determination of facial unconstitutionality cannot be sustained as a matter of law.

The order on review errs by declaring the "first $80" of civil filing fees to be an unconstitutional tax—and then ordering continued collection of the "tax." The

order errs by attempting to sever the requirement to pay $80 from that which purported renders it unconstitutional: its deposit into General Revenue. If it is not a constitutional violation for the Plaintiffs to pay the challenged $80 if it is deposited somewhere other than the General Revenue Fund, the underlying issue reduces to this: into what fund of the State Treasury, if any, does the legislature have the constitutional authority to direct some or all of the proceeds of otherwise lawful civil filing fees? The answer to this question in no way depends on whether the Plaintiffs were required to pay a filing fee for "access to court."

The order creates uncertainty by failing to specify into what State Treasury Fund the "first $80" is to be deposited. Civil filing fees are state funds which are required to be deposited into the State Treasury by law. The order's declaration of a void $80 "tax" raises the likelihood of lawsuits seeking to obtain refund of the "tax." Millions in refunds would further reduce the availability of funds for the court system and administration of justice.

ARGUMENT

STANDARD OF REVIEW

This is an appeal of a lower tribunal's order granting summary judgment and declaring statutes unconstitutional. The standard of review both for a summary judgment and for an interpretation of whether a statute is unconstitutional is *de novo*. *See* Fla. Bar v. Greene, 926 So. 2d 1195 (Fla. 2006); Volusia County v. Aberdeen at Ormond Beach, 760 So. 2d 126 (Fla. 2000); Curd v. Mosaic Fertilizer, Inc., __So. 2d __, Case No. SC08-1920, slip op. filed June 17, 2010, (Fla. 2010).

ARGUMENT I.

THE TRIAL COURT ERRED BY IGNORING DISPOSITIVE ISSUES OF MATERIAL FACT THAT PRECLUDED THE ENTRY OF SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFFS BELOW.

It is axiomatic that summary judgment does not lie unless there is no possibility of any genuine issue of material fact. *See* Cox v. CSX Intermodal, Inc., 732 So. 2d 1092, 1095 (Fla. 1st DCA 1999). The order on review recognizes this principle, stating at Paragraph 11(R- 2438):

> The merest possibility of the existence of a genuine issue of material fact precludes the entry of summary judgment. Hall v. Talcott, 191 So.2d 40 (Fla.1966); Land Management of Florida, Inc. v. Hilton Pine Island Ltd., 974 So.2d 532 (Fla. 2d DCA 2008).

Notwithstanding its invocation of this principle, however, the order on review fails to honor it. This error, standing alone, vitiates the grant of summary judgment contained in the order on review and mandates reversal of the order by this Court.

In the first paragraph of the CFO's Response in Opposition to summary judgment below (R-2414-2415), CFO Sink categorically asserted the existence of disputes of material fact that precluded summary judgment:

> [P]laintiffs continue to rely on a supposed "fact" accepted by neither Defendant Sink nor any other of the Defendants: that the mere deposit of court-related revenues into the State Treasury via the statutory General Revenue Fund signifies that these monies are actually being used for purposes other than funding the administration of justice. See [Summary Judgment] Motion at page 36.

The Response in Opposition goes on to assert:

> [P]laintiffs ignore that undisputed evidence in the record demonstrates that vastly more money from the General Revenue Fund is appropriated and spent to fund the administration of justice in the State of Florida than the General Revenue Fund receives in deposits civil filing fees. See Defendant Exhibit 1. See also General Appropriations Act, Ch. 2009-81, Laws of Fla. ("the GAA").

In the section of the order on review identified as "Factual Allegations," the lower tribunal incorrectly states at paragraph 9: "The factual response [sic] from the Defendants does not dispute the foregoing facts." (R-2437) Nowhere in the order's curiously titled "Factual Allegations," however, is there an undisputed finding of fact that the mere deposit of funds into the General Revenue Fund renders them unavailable for the support of the administration of justice in Florida.

Despite the fact that the order on review contains no express finding that no General Revenue Fund proceeds are (or can be) used to fund the administration of justice, that faulty claim is a linchpin of the order's incorrect rationale.

For example, Paragraph 13 of the order on review states, as if announcing an undisputed fact: "[t]here is no targeted evil or other legitimate reason for the Legislature to direct the first $80 from civil filing fees to be sent to the General Revenue Fund to be spent on non-court-related services." (R-2444). The order goes on to state again that "the funds sent to General Revenue are not being used to provide access to courts, or being spent on court-related services." *Id*. Finally, it states, as if factual and undisputed: "The Legislature is simply taxing one group of citizens and spending the money on unrelated governmental activities, which is illegal and unconstitutional." (R-2444).

Paragraph 14 of the order on review contains these additional unsupported factual assertions:

> It is *equally clear* that monies received from filing fees *are not* being used for court-related functions. In 2008 the Legislature appropriated over $50 million of the money generated from increased filing fees in civil actions to the Department of Corrections for the operation of prisons, which is not part of the judicial branch of government.
>
> ***
>
> Yet, the Legislature continues to divert "user fees" or "taxes" to General Revenue for purposes of funding public services other than the State Court System. It was never the intent of Revision 7 to impose a tax on users of the courts, by collecting filing fees and

> diverting them to pay for non-court related functions, such as the Department of Corrections. (emphasis added).
>
> (R-2444-2445).

Finally, the first decretal paragraph of the order makes plain that it is the mere *deposit* of funds into the General Revenue Fund that the lower tribunal deems to be impermissible as a matter of law. The order states: "That Florida Statutes 28.241(2); 34.041(d); 28.241(1)(a); 28.241(1)(a)(2)(d) and residual fees (Florida Statute 28.2455) directing civil action filing fees be diverted to the General Revenue Fund are unconstitutional and void." (R-2447). This conclusion is obviously based on the same fictional predicate: that any monies deposited into the General Revenue Fund will not be used, are not being used, and cannot ever be used to support the administration of justice in Florida. The Defendants below disputed the purported basis of this counterfactual predicate before the entry of summary judgment. CFO Sink, the State's chief fiscal officer, reasserts that factual dispute in this Court and submits that it should have barred entry of summary judgment below.

As to the purely factual question of whether the State of Florida spends vastly more from the General Revenue Fund balance to support the administration of justice than it takes into the Fund from filing fee proceeds, Paragraph 9 of the "Factual Allegations" contained in the order on review simplistically dismisses the factual dispute as follows:

> [T]he State merely presents argument that the Plaintiff [sic] *incorrectly recites the facts*, arguing that the State funds the Court System with more than it receives from the Clerk. This is not a disputed material fact issue and is instead argument. Consequently, this Court finds there are no disputed facts at bar. (emphasis added).

(R-2437). An "incorrect recitation of the facts" presupposes a "correct recitation:" to wit, the existence of a factual dispute. The order on review, however, never illuminates the "correct recitation" of facts relative to this cardinal question. It simply ignores the existence of the dispute.

The size and the source of the Florida Legislature's annual appropriations in support of the administration of justice are facts, not legal argument. That these facts can be used in support of a legal argument does not transmute the facts themselves into 'argument." The lower tribunal erred by ignoring them in rendering its declaration that aspects of the filing fee statutes were unconstitutional.

Defendants' Exhibit One accurately summarizes the total of appropriations made from General Revenue in support of the administration of justice contained in the 2009-2010 GAA: $765 million dollars. *See* Appendix 1. The GAA itself contains a detailed breakdown of precisely what General Revenue Fund sums are earmarked for each appropriations category. As a matter of law, the appropriations of the GAA are the approved annual budgets for each agency and the judicial branch. *See* §216.181, Fla. Sta. (2009). The amounts of money so appropriated are

arithmetic facts that can be added on a calculator. That the order on review rejected these facts is mute proof that the numbers are inconveniently antithetical to its flawed legal conclusions.

In Farabee v. Bd. of Trustees, Lee County Law Library, 254 So.2d 1 (Fla. 1971) , this Court refused to countenance the myopic view expressed in Flood v. State ex rel. Homeland Co., 95 Fla. 1003, 117 So. 385 (1928) that the use of a portion of a filing fee to pay for a public law library was a not a "cost of the administration of justice." The Court stated:

> In our opinion, the law library fulfills an important and growing need of practitioners, judges, and litigants. It is essential to the administration of justice today, and it is appropriate that its cost be assessed against those who make use of the court systems of our state. Accordingly, we reject appellant's contention that the assessment is an unconstitutional tax disguised as a court cost.

Farabee, at 8.

The essence of the Farabee holding is that costs "essential to the administration of justice today" may constitutionally be "assessed against those who make use of the court systems of our state." Farabee, however, leaves open the question of what constitutes "the administration of justice" for the purposes of cost assessment. Consequently, how much of its statutory General Revenue Fund the State of Florida spends on the administration of justice is not only relevant, but is actually dispositive of the constitutional question presented below: whether civil litigants are being "taxed" to pay for "unrelated governmental activities"

merely because certain filing fee proceeds are deposited directly into the General Revenue Fund of the State Treasury.

The order on review, at Paragraph 14 of the section denominated as "Argument" (R- 2445), wholly erroneously declares:

> The Florida Supreme Court has *already* decided that diversion of filing fees to the General Revenue Fund denies Plaintiffs' constitutional rights to access to courts. Flood v. State ex rel. Homeland Company, 95 Fla. 1003, 1007, 117 So. 2d 385 (1928); Farabee v. Board of Trustees, Lee County Library, 254 So.2d 1(Fla. 1971). (emphasis added).

In neither Flood nor Farabee did this Court pass on any issue relative to the deposit of money into the State Treasury's General Revenue Fund created by Section 215.32, Florida Statutes. Both Flood and Farabee arose before the 1998 amendment of the Florida Constitution by Revision Seven of Article V, Section 14, and each addressed county-imposed library fees, to be collected and deposited as county funds, and not anything having to do with the collection or deposit of state funds. *See* §28.37(2), Fla. Stat. (2009) (all court-related fines, fees, service charges, and costs are considered state funds). In neither decision is the phrase "General Revenue Fund" even mentioned. Consequently, neither decision is in any respect "on all fours" with the unique issue presented in this appeal: into what State Treasury Fund may the State of Florida lawfully deposit its own court-related revenues?

The order on review never mentions that continuously since 1977, Section 28.241, Florida Statutes, has required that a portion of each civil filing fee be deposited into the General Revenue Fund. *See, e.g.*, Chapter 77-284, Laws of Florida. The amount deposited has, of course, increased over the years—from $2 in 1977 to the $80 now required to be deposited in the General Revenue Fund. From 1977 to date, this Court has never issued any opinion criticizing, let alone invalidating, the statutory requirement for deposit of a portion of civil filing fees into the General Revenue Fund.

The Flood case reflects the sociology and jurisprudence of a bygone era of Florida history, when the administration of justice did not include Miranda warnings, constitutionally-required, state-paid public defenders, or guardian ad litem programs—or public law libraries. The specific holding in Flood—that litigants could not lawfully be "taxed" to support a county's public law library—thanks to the Farabee decision, is obsolete.

But even Farabee was decided before Florida's burgeoning population made the administration of justice much more costly in the 21st century than it was in 1971. Farabee correctly makes plain that funding a law library is, indeed, a proper cost of the administration of justice, but the opinion fails to specify what else might also be deemed to be other costs "essential to the administration of justice today." Moreover, Farabee was decided over 30 years before the enactment of Revision

Seven which made the State rather than the counties the primary funder of the administration of justice in Florida.

Defendants' Exhibit One outlined the vast sums appropriated from the General Revenue Fund balance by the Florida Legislature to support functions "essential to the administration of justice today" for FY2009-2010. The lower tribunal did not allow any factual inquiry into whether the court-related monies taken into General Revenue from filing fee proceeds paid for essential costs of the administration of justice. It simply presumed—without any sound evidentiary foundation-- that all of the funds in question were reserved for "unrelated governmental activities."

Because of the timing of the litigation in this matter, the record contains only a mid-fiscal year estimate of the total Article V court-related revenues expected to be deposited into the General Revenue Fund during the entire fiscal year. Moreover, the record contains no figure at all reflecting the total amount of money derived only from the "first $80" fee portions at issue in this case, a figure notably different than the $200.6 million dollar Article V revenue estimate found at R-1542. Because the 2009-2010 fiscal year has concluded, the actual numbers for both total Article V revenues deposited into the General Revenue Fund and the "first $80" subset thereof are available. CFO Sink believes that it is important that

the Court's consideration of this issue be based on "hard numbers" rather than unfounded evidentiary presumptions as to state expenditures.

The summary judgment entered below was the product of plain reversible error and should be overturned by this Court.

ARGUMENT II.

THE LOWER TRIBUNAL ERRED BY DECLARING THAT FLORIDA STATUTES REQUIRING THE DEPOSIT OF A PORTION OF CIVIL FILING FEES INTO THE GENERAL REVENUE FUND VIOLATE THE FLORIDA CONSTITUTION.

The order on review's ultimate declaratory judgment is expressed in its paragraphs 16 and 17 (R- 2446-2447):

> In this case, the Plaintiffs have challenged the statutes on their face as applied to them, and have met the requirements for a facial challenge set out in Cashatt v. State, 873 So.2d 430, 434 (Fla. 2004)[sic].
>
> The statutes that require a ministerial depositing of a portion of civil action filing fees into the General Revenue Fund denies [sic] Plaintiff's [sic] right of access to the courts under the applicable laws of this State. They also deny the citizens of this state the right to have their courts adequately funded, in violation of Article V, Section 14, and the due process, equal protection, right to jury trial guarantees of accorded [sic] under the Florida Constitution.

Under Florida law, there are two types of challenges to the constitutionality of legislative enactments: facial and "as applied." *See* Sarnoff v. Fla. Dep't of Highway Safety & Motor Vehicles, 825 So. 2d 351 (Fla. 2002). A facial challenge "considers only the text of the statute, not its application to a particular set of circumstances, and the challenger must demonstrate that the statute's provisions pose a present total and fatal conflict with applicable constitutional standards." *See* Cashatt v. State, 873 So.2d 430, 434 (Fla. 1st DCA 2004) A challenger must establish that "no set of circumstances exists under which the statute would be valid." Fla. Dep't. of Revenue v. City of Gainesville, 918 So. 2d 250 (Fla. 2005);

Cashatt, *supra*. If any state of facts, known or assumed, justify the law, the court's power of inquiry ends. *See* State v. Bales, 343 So.2d 9, 11 (Fla. 1977). *Accord*, U.S. v. Carolene Products, 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed 1234 (1938).

In contrast, an "as applied" challenge concedes that the enactment of a statute is within the delegated authority of the legislature, but asserts that its application to a person in his or her particular circumstances would transgress constitutional limitations. *See* Maas v. Olive, 992 So. 2d 196 (Fla. 2008); Olive v. Maas, 811 So. 2d 644 (Fla. 2002); Volusia County v. Aberdeen at Ormond Beach, 760 So. 2d 126 (Fla. 2000); White v. Bd. of Comm'rs of Pinellas County, 537 So. 2d 1376 (Fla. 1989). A facial challenge is determined based upon the language of the challenged statute, whereas an "as applied" challenge depends on evidence of a specific constitutional infirmity flowing from the application of the statute. *Id.*

The order on review, however, has declared long-established aspects of the State's civil filing fee statutes facially unconstitutional not because the Florida legislature lacks the authority to enact a civil filing fee statute, but rather because these statutes, as applied to the Plaintiffs below, are presumed to promote underfunding of the court system. As to the statutes' supposed denial of "access to courts" to the Plaintiffs, it is not because the statutes in question deny them the right to institute civil actions, or that they were individually denied the right to institute legal proceedings against the State based on the statutes they challenge.

Rather, according to the less than clear rationale of the order on review, the direct deposit into the State Treasury's General Revenue Fund of a portion of the Plaintiffs' shared filing fee for this case somehow creates a presumption that they will receive inferior court services *after* they achieve "access," which inferior services stem from underfunding of the court system. Plaintiffs never alleged that the amount of the civil filing fee they jointly paid represented a denial of their right of access to courts. Indeed, in the Plaintiffs' Motion for a Temporary Injunction, they have specifically forsworn a refund of the $80 portion of their civil filing fee that was deposited into the General Revenue Fund[1].

No provision of the Florida Constitution prohibits the Legislature from requiring the deposit of some or all of the proceeds of civil filing fees into the General Revenue Fund of the State Treasury. This fact ought to be completely dispositive of any claim that it is facially unconstitutional for a statute to identify the State Treasury account into which civil filing fees are to be deposited. The basic fallacy of the order on review, however, is that it treats the matter of where in the State Treasury state funds are initially deposited as a proxy for the Legislature's ultimate decision of where to direct the funds via the appropriations process. Merely prohibiting the deposit of certain court-related monies into the General Revenue Fund can in no way compel the Legislature to fund "the court

[1] "Petitioners/Plaintiffs do not seek a refund of any filing fees previously paid to the Clerks and diverted to General Revenue." (R -1375).

systems" (in the words of Farabee) at a level that the Plaintiffs—or the lower tribunal—might deem to be optimal.

Even if the challenged $80 were to be deposited into the Clerks of the Court Trust Fund, as the pleadings below urged (RTR-32), no provision of Florida law would require the Legislature actually to appropriate the entire contents of that trust fund for any particular purpose. Perhaps more importantly, no provision of Florida law would *prevent* the Legislature from appropriating every penny of the challenged $80 fee portions in support of the administration of justice in Florida, irrespective of whether the monies were initially deposited into the General Revenue Fund or not. If the constitutional evil to be remedied is the underfunding of the state court system, judicial prescription of how the State accounts for its revenues is simply not an effective method by which to control the size of the legislative appropriations that determine the State's expenditures for the administration of justice.

Article V, Section 14 of the Florida Constitution, entitled "Funding," provides, in its entirety, as follows:

> (a) All justices and judges shall be compensated only by state salaries fixed by general law. Funding for the state courts system, state attorneys' offices, public defenders' offices, and court-appointed counsel, except as otherwise provided in subsection (c), shall be provided from state revenues appropriated by general law.
>
> (b) All funding for the offices of the clerks of the circuit and county courts performing court-related functions, except as otherwise

> provided in this subsection and subsection (c), shall be provided by adequate and appropriate filing fees for judicial proceedings and service charges and costs for performing court-related functions as required by general law. Selected salaries, costs, and expenses of the state courts system may be funded from appropriate filing fees for judicial proceedings and service charges and costs for performing court-related functions, as provided by general law. Where the requirements of either the United States Constitution or the Constitution of the State of Florida preclude the imposition of filing fees for judicial proceedings and service charges and costs for performing court-related functions sufficient to fund the court-related functions of the offices of the clerks of the circuit and county courts, the state shall provide, as determined by the legislature, adequate and appropriate supplemental funding from state revenues appropriated by general law.
>
> (c) No county or municipality, except as provided in this subsection, shall be required to provide any funding for the state courts system, state attorneys' offices, public defenders' offices, court-appointed counsel or the offices of the clerks of the circuit and county courts performing court-related functions. Counties shall be required to fund the cost of communications services, existing radio systems, existing multi-agency criminal justice information systems, and the cost of construction or lease, maintenance, utilities, and security of facilities for the trial courts, public defenders' offices, state attorneys' offices, and the offices of the clerks of the circuit and county courts performing court-related functions. Counties shall also pay reasonable and necessary salaries, costs, and expenses of the state courts system to meet local requirements as determined by general law.
>
> (d) The judiciary shall have no power to fix appropriations.

First, contrary to the order on review, Article V, Section 14, contains no language that confers upon the citizens of the State of Florida "the right to have their courts adequately funded." (R-2447). In addition, this Article contains no language that prescribes any account into which court-related revenues must be

deposited. Indeed, the article contains no language at all that deals with the deposit of funds received in association with the institution of civil court proceedings. To the extent that the order on review has concluded that the deposit of filing fee proceeds into the General Revenue Fund contravenes Article V, Section 14, that conclusion finds no support whatsoever in the express language of the article. Therefore, the order's declaration that the "ministerial depositing" of filing fee proceeds is a facial violation of Article V, Section 14, is simply erroneous as a matter of law.

Article V, Section 14, nowhere suggests that funding for the state court system must be provided exclusively from revenues taken in "at the court house door." On the contrary, subsections (a) and (b) both direct that expenses of the administration of justice be defrayed from "state revenues appropriated by general law." Under subsection (a), these expenses are identified as "[f]unding for the state courts system, state attorneys' offices, public defenders' offices, and court-appointed counsel. . ."; funding for these functions certainly must fall within the ambit of "costs essential for the administration of justice today" within the meaning of Farabee. Under subsection (b), these expenses are identified as "the court-related functions of the offices of the clerks of the circuit and county courts" which *cannot* be funded from "adequate and appropriate filing fees for judicial proceedings and service charges and costs for performing court-related functions"

because of constitutional requirements that prevent the imposition of fees or other charges; this funding, too, must be deemed to represent a cost essential to the administration of justice.

The Florida Constitution thus expressly contemplates state General Revenue funding for the administration of justice over and above revenues that might be received from filing fees, service charges, and costs. It could hardly be otherwise: the operation of the criminal justice system of the fourth largest of the United States is a colossal expense, not a profit center.

It is noteworthy that the only mention of the word 'adequate" in Article V, Section 14, occurs in subsection (b), not in connection with the court system but rather in connection with the offices of clerks of court. Subsection (b) requires that funding for the court-related-functions performed by the offices of clerks of court "shall be provided by adequate and appropriate filing fees for judicial proceedings and service charges and costs." To the extent that the order on review states the bald conclusion that "[t]he purpose of the filing fees or user fees is to fund the Court System" (R-2445), that conclusion is simply not consistent with the actual language of Article V, Section 14. Indeed, subsection (b) states only that "*Selected* salaries, costs, and expenses of the state courts system *may* be funded from appropriate filing fees for judicial proceedings and service charges and costs for performing court-related functions, as provided by general law." (emphasis added).

Contrary to the order on review, the purpose of "adequate and appropriate filing fees" is to fund the court-related functions of the clerks of court; the use of filing fees to fund selected costs of the court system is permissive rather than mandatory—and the option to so fund belongs to the Florida Legislature and its constitutional appropriations authority.

The last subsection of Article V, Section 14, underscores that the sole authority to appropriate state funds for the implementation of the article, as revised, rests with the Florida Legislature. Subsection (d) provides: "The judiciary shall have no power to fix appropriations." The clear implication of the order on review, however, is that the trial court's rejection of the deposit of filing fees into the General Revenue Fund was intended somehow to "fix" the underfunding of the court system. In its first paragraph (R-2434-2435), the order solemnly states:

> The Inherent Powers Doctrine has been exercised in extraordinary and unusual cases to invalidate statutes which unconstitutionally tread on the inherent powers of the judiciary. This is such a case.

The lower tribunal apparently considers that statutes requiring the deposit of civil filing fee proceeds into the General Revenue Fund of the State Treasury "unconstitutionally tread on the inherent powers of the judiciary." Either the trial court is suggesting that the judiciary's inherent powers include the supervision of state accounting procedures—a job that is actually CFO Sink's under Article IV, Section 4 and various Florida Statutes —or it is suggesting that the judiciary's

inherent powers include determining the amount of court-related appropriations. Given the order's focus on the "diversion" of funds that the trial court clearly felt ought to be earmarked for support of the court system, the latter interpretation is more likely than the former. If so, that view is impossible to square with Article V, Section 14(d), and clearly implicates the separation of powers doctrine that is the linchpin of republican government under both state and federal constitutions. *See* Locke v. Hawkes, 595 So.2d 32 (Fla. 1992); Chiles v. Children, 589 So. 2d 260 (Fla. 1991); McPherson v. Flynn, 397 So.2d 665 (Fla. 1984); Ponder v. Graham, 4 Fla. 23 (1851). *Cf.* Rose v. Palm Beach County, 361 So.2d 135 (Fla. 1978) (doctrine of inherent judicial powers "very narrow"). Accord, Maas v. Olive, *supra*. *See also The Federalist No. 47* (James Madison), *No. 51* (Alexander Hamilton).

That the lower tribunal's concern was not for the integrity of state accounting procedures is demonstrated by its summary rejection as persuasive authority of Fox v. Hunt, 619 So.2d 1364 (Ala. 1993). In that sound decision, the Alabama Supreme Court refused to invalidate a $50 civil jury trial fee merely because $40 of it was earmarked for the state's general revenue fund. Rejecting the argument—identical to that accepted in the order on review—that all monies going into the general revenue fund were "for the benefit of other state programs," and therefore a "tax" on litigants, the Court held:

> The State's evidence in support of its motion for summary judgment showed that in fiscal year 1989-90 the State, to run the judicial system, spent over $59 million more than the $500,000 collected in jury fees. This Court would have to deny the economic reality of the Legislature's funding of the judiciary in favor of an accounting artifice in order to hold that any portion of the jury trial fees collected by the circuit court clerks actually went to programs, other than the judiciary, funded through the state's general fund. Therefore we hold that neither the jury trial fee, nor the portion of it that is paid directly into the general fund, is an unconstitutional tax on the right to litigate or on the right to a jury trial in a civil case.

619 So.2d at 1367.

Unfortunately, the lower tribunal accepted the very "accounting artifice" that was intelligently rejected by the Fox court: that any civil filing fee proceeds deposited into the General Revenue Fund are ineligible to be spent on the costs of the administration of justice, and therefore cannot be offset against other general revenue expenditures for that purpose, no matter how large those expenditures might be. The order on review thus followed a wholly unsound Texas decision from 1986, one that was specifically rejected by the Fox court: Lecroy v. Hanlon, 713 S.W. 2d 335 (Texas 1986). That the Lecroy majority lacked a basic understanding of basic government accounting principles is shown by this bizarre statement from the opinion:

> The $11 million in general revenue raised from the fee flows out of the treasury at random. [sic] Since the judiciary accounts for only approximately ½ of 1% of state spending, 99.5% of the revenue raised from the fee must go to other programs besides the judiciary.

Id, at 341, fn. 9. CFO Sink assures this Court that, in 2010, funds do not leave the State Treasury of Florida "at random." Article VII, Section 1(c) of the Florida Constitution plainly provides: "No money shall be drawn from the treasury except in pursuance of appropriation made by law."

Once a dollar is deposited into the State Treasury, it retains no separate identity based upon where it might have been collected. Money is fungible, and, once commingled, it loses its separate character. *See, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (op. filed June 10, 2010); U.S. v. Sperry Corp., 493 U.S. 52; 110 S.Ct. 387; 107 L. Ed. 2d. 290 (1989); Pfrengle v. Pfrengle, 976 So.2d 1134 (Fla. 2d DCA 2008). There is no "taxi rank" of identifiable "general revenue" dollars earmarked for distribution to agencies based on the proportion that its budget bears to the entire State budget. In Florida, what revenue "goes to other programs besides the judiciary" is determined solely by how large an appropriation the Legislature decides to make for each such program in the annual GAA.

The order on review misconstrues an Oklahoma decision that does not even address the salient issue of this case: whether it is unconstitutional for a statute to require the deposit of court-related revenues in a state's general revenue fund. Fent v. State of Oklahoma ex rel. Dept of Human Services, (cite) 2010 WL 165086 (OK 2010), declared unconstitutional portions of an Oklahoma statute that required that portions of civil filing fees be deposited to the credit of three

programs that the court declared "not related to services provided by the courts for which reimbursement to the State is permitted. . . . 2010 WL 165086, at 9, ¶23. The programs were the Mutual Consent Voluntary Registry and Confidential Intermediary Search Program for adoptees and their biological relatives; at 8, ¶19; a Child Abuse Multidisciplinary Account for the funding of child abuse investigatory teams in each county, at 8, ¶20; and the Office of the Attorney General Victims Services Unit to provide services to victims of domestic violence or sexual assault; at 9, ¶22. The court characterized the programs in question as "social welfare programs under the operation of the executive branch of government." Id., at 9, ¶23.

The challenged filing fee statutes here, however, do not specify funding for a "social welfare program." The statutes merely require that proceeds be deposited into the General Revenue Fund. It is noteworthy that there are filing fee provisions found in Section 28.101, Florida Statutes, that are exactly analogous to the overturned Oklahoma "earmarks," but those provisions were not challenged by the Plaintiffs below. For example, when dissolution of marriage cases are filed, clerks of court are responsible for collecting separate charges for deposit into the Child Welfare Training Fund (§28.101(1)(a), Fla. Stat.); the Displaced Homemakers Trust Fund, (§28.101(1)(b), Fla. Stat.); and the Domestic Violence Trust Fund "for

the specific purpose of funding domestic violence centers" (§28.101(1)(c), Fla. Stat. (2009).)

Moreover, it is also noteworthy that the Clerk of the Courts Trust Fund, into which court-related revenues are deposited by the clerks of court, is under the supervision of the executive branch, located by law, along with the Clerk of Courts Operations Corporation, in the Justice Administrative Commission. *See* §§28.35(1); 28.37(2), Fla. Stat. (2009). CFO Sink submits that the funding of the Justice Administrative Commission and its component entities certainly represents "costs of the administration of justice today" within the meaning of Farabee, for which General Revenue Funds must be expended under Article V, Section 14 of the Florida Constitution. Florida's constitutional requirements are not those of Oklahoma.

The order on review erroneously erases the real distinction between the statutory "earmarks" of Oklahoma filing fee proceeds rejected in Fent and a requirement that a portion of filings fees be deposited into the General Revenue Fund of the Florida State Treasury:

> The Oklahoma statute set out certain sums of money to be paid as additional filing fees and court costs, and the money remitted to the Department of Human Services and the Attorney General, the same as the Florida Statutes in question require a portion of all filing fees collected by the clerks be remitted to General Revenue of the State of Florida.

(R-2441). This statement is simply wrong as a matter of fact and law. Sections 28.101 and 28.241, Florida Statutes, both have filing fee "earmarks" which are "the same as" Oklahoma's, but the challenged statutory provisions are not in that category. The challenged provisions do not designate where money is to be spent, and do not in any way prohibit any part of the General Revenue Fund balance from being spent on the costs of the administration of justice. Defendants below showed conclusively that more was being spent on that purpose than was being taken into General Revenue from filing fees, and therefore conclusively showed that the challenged statutes were not facially unconstitutional.

When reviewing de novo a lower court decision striking state statutes, this Court has stated that it is "obligated to accord legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome whenever possible." *See* Florida Dept. of Revenue v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005); Fla. Dept. of Revenue v. Howard, 916 So. 2d 640 (Fla. 2005). The order on review does not reflect that the lower tribunal accorded any presumption of validity to the challenged statutes. The order on review also failed to recognize that, even under the rationale adopted by the lower tribunal, there is an obvious fact scenario under which the requirement for the deposit of filing fees into the General Revenue Fund would be unobjectionable: if all of the money so deposited were used to pay the costs of "the court systems." Because

this is the case, a set of circumstances exists in which the statutes would be valid. Therefore, the order's determination that the challenged statutes are facially unconstitutional cannot be sustained as a matter of law. *See* Fla. Dept. of Revenue v. City of Gainesville, *supra*, at 256; State v. Bales, *supra*, at 11.

The order on review must be reversed.

ARGUMENT III.

THE LOWER TRIBUNAL DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW BY ORDERING THE CONTINUED COLLECTION OF A FEE IT DECLARED TO BE "UNCONSTITUITONAL AND VOID."

The fundamental error of the order on review is demonstrated by the fact that it appears to have declared "unconstitutional and void" a portion of civil filing fees as a supposed "tax" that denied "Plaintiff's right of access to courts under applicable law of this State"—and then ordered that the fees continue to be collected. This is shown in the order's primary decretal paragraphs which state as follows:

> 1. That Florida Statutes 28.241(2); 34.041(d); 28.241(1)(a); 28.241(1)(a)(2)(d); and residual fees (Florida Statute 28.2455 directing civil action filing fees be diverted to the General Revenue Fund are unconstitutional and void.
>
> 2. The provisions of the afore-stated statutes providing for increased assessment and collection of user fees are severable from the unconstitutional and invalid provisions which seek to divert these user fees to the General Revenue Fund.
>
> 3. Defendants are hereby enjoined from implementing and enforcing the unconstitutional and invalid provisions of the subject afore-stated statutes.

(R-2447).

The decretal paragraphs quoted above are not masterpieces of clarity. Their import, however, contrary to Flood and Lecroy v. Hanlon, *supra*, is that the ostensibly unconstitutional and void tax must still be collected by the clerks of

court. The order contains no discussion of legal issues related to severability, and Chapter 2009-61, Laws of Florida, which enacted the challenged statutes, contains no severability clause. Moreover, the term "user fees" cannot be found in any of the challenged statutes, and the lower tribunal did not explicate what it meant by the term. Nevertheless, decretal paragraph 2, *supra*, without explanation, attempts to declare "severable" the statutes' "increased assessment and collection of user fees" and "invalid provisions that seek to divert these user fees to the General Revenue Fund." Neither logic nor law supports this elusive distinction. When a statute has been finally determined to be facially unconstitutional, it is void *ab initio* and therefore unenforceable. As this Court once stated long ago:

> The courts have no power to make a statute inoperative only from the date of an adjudicated invalidity, because the courts merely adjudge that a statute conflicts with organic law, and the Constitution then operates to make the statute void from its enactment, the courts having no power to control the operation of the Constitution.

State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739. *But See* Deltona Corp. v. Bailey, 336 So. 2d 1163, 1166 (Fla. 1976).

CFO Sink submits that if a statute imposes a "tax" that exceeds the authority of the Legislature to impose, then either the statute in its entirety, or the portion thereof that actually imposes the void exaction, must be invalidated. In the context of the instant challenge to the State's filing fee statutes, application of this principle would result either in a declaration that no filing fee at all could be

charged—that is, in the absence of severability-- or that the total charged for a filing fee must be reduced by the severable *amount* of the invalid "tax."

The order on review attempts to avoid the practical effect of its declaration that Plaintiffs' payment of $80 is an unconstitutional and void 'tax." Rather than severing the purportedly invalid payment requirement from the statutes, the order errs by attempting to sever the payment requirement from that which is supposed to render it invalid; the deposit of the payment into the General Revenue Fund. This attempt reveals the lower tribunal's unstated conclusions that the Legislature has the lawful authority to impose a civil filing fee of "up to $395" on the Plaintiffs and that no facially unconstitutional 'tax" is involved[2].

The real question is this: into what "accounting artifice" of the State Treasury, if any, does the Legislature have the constitutional authority to direct some or all of the proceeds of otherwise lawful civil filing fees? The answer to this question does not hinge in any way on whether the Plaintiffs' rights were infringed. The order's attempt to keep the $80 payment in place shows that the Plaintiffs' rights were not infringed merely by their having to pay the statutory filing fee.

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[2] At the November 18, 2009, injunction hearing, the trial court observed: "And let me just say this for the record, I understand that the argument here is being made is not that they are being deprived of access to courts, but, in fact, they are being charged $80 too much to get there." (R-TR-74)

A. Uncertainty Is Created by the Order on Review

It is settled that a declaratory judgment should dispel uncertainty, not create it. *See* Santa Rosa County v. Admin. Comm., Div. of Admin. Hearings, 661 So. 2d 1190 (Fla. 1995); Martinez v. Scanlan, 582 So. 2d 1167 (Fla. 1991). The order on review, however, leaves many unanswered questions. While it is clear that the trial court accepted the Plaintiffs' claim that it was unconstitutional merely to deposit filing fee proceeds into the General Revenue Fund, the order on review does not indicate at all *where* it would be constitutional to deposit the said filing fee proceeds. Section 215.31, Florida Statutes, provides:

> Revenue, including licenses, fees, imposts, or exactions collected or received under the authority of the laws of the state by each and every state official, office, employee, bureau, division, board, commission, institution, agency, or undertaking of the state or the judicial branch shall be promptly deposited in the State Treasury, and immediately credited to the appropriate fund as herein provided, properly accounted for by the Department of Financial Services as to source and no money shall be paid from the State Treasury except as appropriated and provided by the annual General Appropriations Act, or as otherwise provided by law.

This statute was neither challenged below nor invalidated by the order on review. Consequently, it is inescapable that the "first $80" of a filing fee must be deposited into the State Treasury because the funds in question are state funds. *See* §28.37, Fla. Stat. (2009). But the State Treasury is subdivided for accounting purposes, as described in Section 215.32(1), Florida Statutes (2009):

> (1) All moneys received by the state shall be deposited in the State Treasury unless specifically provided otherwise by law and shall be deposited in and accounted for by the Chief Financial Officer within the following funds, which funds are hereby created and established:
>
> (a) General Revenue Fund.
>
> (b) Trust funds.
>
> (c) Budget Stabilization Fund.

Thus, the failure of the order on review to specify where the "first $80" is supposed to be deposited generates considerable uncertainty: for clerks, who are obligated to deposit the funds; for the Florida Department of Financial Services, which must account for the funds; and for CFO Sink, who must invest the funds under Section 17.57, Florida Statutes. The order on review would rewrite the filing fee statutes but it fails to acknowledge that filing fee statutes are merely a part of the complex web of statutes that deal with the vital question of how the State's funds are to be appropriated and accounted for. If this Court is inclined to accept the lower tribunal's statutory "rewrite," CFO Sink urges the Court to consider this question.

CFO Sink also urges the Court to consider another source of uncertainty generated by the order on review: the question of whether current and former litigants would be entitled to a refund of some or all of previously paid filing fees from which monies were deposited into the General Revenue Fund. Funds derived from civil filing fees have been deposited in the General Revenue Fund

continuously since 1977. If this Court concludes that a requirement that fee proceeds be deposited into the General Revenue Fund is, in fact, a "tax on litigants" that is "unconstitutional and void," it is highly likely that efforts to obtain refunds of these "taxes" will be pursued under 42 U.S.C. §1983 or by class action suit such as that seen in Kuhnlein v. Dept. of Revenue, 689 So. 2d 266 (Fla. 1997). Given the substantial sums that would be at issue, the funding of potential refunds and attendant attorney's fee claims will represent a massive and unforeseen drain on the State Treasury. Even if the Court, as did the Texas court in Lecroy v. Hanlon, were to opine that no refunds should be paid, and that any determination of invalidity should operate only prospectively, there would be no guarantee that federal claims for refunds of allegedly unlawful exactions under color of State law could still not be pursued. Paradoxically, in light of the order's concern for underfunding of the court system, if millions in refunds must be paid, an affirmance by this Court of the "tax on litigants" rationale would result in a substantial diminution of funds available to support the court system and the administration of justice in Florida.

This Court can avoid this result by rejecting that rationale. The deposit into the General Revenue Fund of certain civil filing fee proceeds is not a "tax" on litigants; it is simply a matter of government accounting. The deposit of money into General Revenue in no way signifies any particular end use for the money.

That is decided only by appropriation of the Legislature, as required by the Florida Constitution. Even if a trust fund is brimming with cash, under settled Florida budget law the entire balance cannot be spent unless it is appropriated by the legislature and released by the Governor or the Chief Justice. *See* §215.32 (2)(b)1, Fla. Stat. (2009); *See generally* §216.192, Fla. Stat.(2009). Moreover, under Section 215.32, Florida Statutes, which was not challenged below, the Legislature retains the right to "sweep" unappropriated cash balances found in trust funds:

> Notwithstanding any provision of law restricting the use of trust funds to specific purposes, unappropriated cash balances from selected trust funds may be authorized by the Legislature for transfer to the Budget Stabilization Fund and General Revenue Fund in the General Appropriations Act.

See §215.32(4)(a), Fla. Stat. (2009); *cf.* §215.32(4)(b), Fla. Stat. (2009).

In the final analysis, a judicial directive that all filing fee proceeds be concentrated for accounting purposes into the Clerks of the Court Trust Fund of the State Treasury—or into the State Courts Revenue Trust Fund, for that matter—would certainly accomplish the result of enlarging the cash balances on deposit in the trust fund, but will have no effect on whether any of that balance would be appropriated to alleviate the underfunding of the court system. The CFO urges the Court to reject the unsound, "bootstrap" rationale of the order on review and uphold the constitutionality of the filing fee provisions of Chapter 28, Florida Statutes.

CONCLUSION

Based on the foregoing, the order on review must be reversed.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

ALEX SINK,
CHIEF FINANCIAL OFFICER, ETC.

Petitioners,

CASE NO: SC10-1319/ SC10-1317

vs.

1st DCA Case No.: 1D10-2978/1D10-2972

Lower Tribunal No.: 2009-CA-001386

ROBERT M. ERVIN, ET AL.

Respondents.

_____/

APPENDIX TO INITIAL BRIEF OF
CHIEF FINANCIAL OFFICER ALEX SINK

1. Defendant's Exhibit One

Total Appropriations For Administration Of Justice, Fy-2009-2010
Chapter 2009-81, Laws Of Florida

TOTAL APPROPRIATIONS FOR ADMINISTRATION OF JUSTICE,
FY-2009-2010
CHAPTER 2009-81, LAWS OF FLORIDA

JUSTICE ADMINISTRATION (rounded to nearest million)

From General Revenue Fund:	$630 million
From Clerk of Court Trust Fund:	$451 million
From other trust funds:	$105 million
Total from all trust funds:	$556 million
Total from all Funds:	$1.186 billion

JUDICIAL BRANCH (rounded to nearest million)

From General Revenue Fund:	$135 million
From all trust funds:	$316 million
Total from all Funds:	$451 million

TOTAL APPROPRIATIONS (rounded to nearest million)

From General Revenue Fund:	$765 million
From all trust funds:	$872 million
Total from all Funds:	$1.637 billion

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Initial Brief of Petitioner Chief Financial Officer Alex Sink was furnished by U.S. Mail this 13th day of August, 2010, to the counsel for Respondents below:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.210(a)(2), I certify that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirements of Rule 9.210, Florida Rules of Appellate Procedure.

_____
Richard T. Donelan, Jr.