WHY DOES FLORIDA HAVE PUBLIC DEFENDER ELECTIONS?

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I. INTRODUCTION

The Sixth Amendment to the Constitution guarantees that anyone within the borders of the United States who is accused of a crime will have effective assistance of counsel. The Supreme Court of the United States has deemed this principle as so fundamental to our society that it is mandated in all criminal trials. The public defender system was implemented by every state to accomplish this noble goal.

The state of Florida is different from all other states, with the exception of Nebraska, Tennessee, and parts of California, in its implementations of this mandate. Florida uses an election process to determine who will take the position of public defender in each of its judicial districts.

Section II of this article provides a brief overview of the history of the right to assistance by counsel. This background information is crucial in

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1. U.S. CONST. amend. VI.
3. See e.g., FLA. CONST. art. V, § 18.
5. FLA. CONST. art. V, § 18.
6. See infra Section II; see also Gideon, 372 U.S. at 344.
evaluating the arguments in favor and against popular elections for public
defenders.7

Section III of this article discusses why Florida elects its public
defenders and the arguments for and against this election system.8
Determining these reasons is crucial in understanding whether Florida has a
system that is in the best interest of the public and strikes a balance with the
preservation of our adversarial system.9 This section also addresses the
advantages and downfalls of this election system.10 Additionally, this
section explores some strategies and campaign tactics that previous public
defender candidates have used in the past in order to determine whether
this system establishes the goals it was set out to meet.11

Section IV discusses the Office of Criminal Conflict and Civil
Regional Counsel ("OCCCRC").12 The Florida legislature has now passed
into law essentially a second public defender’s office.13 This has come to
light in view of the conflict of interest that sometimes exists when the
public defender’s office is assigned to two co-defendants.14 This piece of
legislation raises a significant issue because the OCCCRC is appointed by
the governor whereas the public defenders are elected.15

The importance of this issue is a matter of public policy.16 The office
of the public defender is essential to our adversarial system.17 In order for
an indigent individual to have a fair trial, it is imperative that the public
defender office be free from any outside influences.18 The purpose of this
article is to explore whether an appointed public defender is less capable of
guaranteeing the Sixth Amendment to the Constitution’s promise of
effective assistance of counsel when compared to an elected public
defender.19 This is very important to the public as a whole, especially in
the state of Florida.20 Finally, Section V argues that the Florida

7. See Wright, supra note 4, at 814.
8. See infra Section III; see also Crist v. Fla. Ass’n of Crim. Def. Lawyers, Inc., 978 So. 2d 134, 146–47 (Fla. 2008).
9. See Crist, 978 So. 2d at 147.
10. See e.g., Wright, supra note 4, at 812.
11. See id. at 817.
12. See infra Section IV; Crist, 978 So. 2d at 137(discussing the Criminal Conflict and Civil
Regional Counsel).
13. Crist, 978 So. 2d at 137
14. Id. at 138.
15. See id. at 146–48.
16. See Wright, supra note 4, at 822.
17. Crist, 978 So.2d at 147 (citing Wilson v. Wainright, 474 So. 2d 1162, 1164 (Fla. 1985)).
20. See Wright, supra note 4, at 822.
Constitution should be amended to provide for the appointment of public defenders.21

II. A HISTORICAL OVERVIEW

The right to have counsel has been a fundamental part of our nation for almost its entire existence.22 The Sixth Amendment to the Constitution states that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”23 However, this guarantee was not mandated for indigents until 1932.24 In Powell v. Alabama,25 the Supreme Court of the United States recognized the need to provide assistance to indigents for capital cases.26 The Court executed this mandate by applying the Due Process Clause of the Fourteenth Amendment to the Sixth Amendment and thus making it a right protected by the Constitution.27 However, the Court did not decide whether an indigent should be provided assistance of counsel in non-capital cases.28 It was not until six years later when the Court decided Johnson v. Zerbst,29 that the Court broadened this mandate to all federal courts.30 However, in 1942, in its decision in Betts v. Brady,31 the Court declared that the right to assistance of counsel to indigents was not a fundamental right.32 The Court reviewed all of the original thirteen states’ constitutions and determined that they did not include an inherent right to the assistance of counsel.33 The court looked at the constitutions of all of the states and determined that in a majority of states, while a defendant could not be denied the option to appoint counsel, a defendant was not entitled to assistance of counsel.34 This case was the law for more than twenty years.35

21. See infra Part V.
22. See U.S. CONST. amend. VI.
23. Id.
26. Id. at 73.
27. See id. at 72–73.
28. Simon, supra note 24, at 585.
30. Id. at 467–68.
32. See id. at 471.
33. Id. at 467–71.
34. Id. at 468.
35. Simon, supra note 24, at 585.
In 1963, the Supreme Court of the United States decided *Gideon v. Wainwright* was decided. 36 This landmark case established that assistance of counsel is a right guaranteed to indigent individuals who face criminal charges. 37 The petitioner Gideon was charged with a misdemeanor for breaking into a pool hall with intent to commit a misdemeanor within, 38 a felony under Florida law. 39 When Gideon appeared at trial, he had no funds to hire a lawyer and requested that one be appointed to him. 40 The court responded that it could not appoint a lawyer under the laws of the state of Florida. 41 Gideon had no choice but to represent himself. 42 He argued and conducted his defense as well as could be expected from a person who was not an educated lawyer. 43 The jury returned a verdict of guilty and he was sentenced to five years imprisonment. 44 He then filed a habeas corpus petition with the Florida Supreme Court. 45 However, under the Supreme Court of the United States’ holding in *Betts v. Brady*, the Florida Supreme Court had to deny him all relief he sought. 46 Then the Supreme Court of the United States granted certiorari to review this decision. 47 The Court noted that the facts and circumstances surrounding Gideon’s case were almost indistinguishable from those in *Betts v. Brady*. 50 The Court’s analysis began by looking at the precedent established before *Betts v. Brady* that led the Court to its decision. 49 The Court looked to this analysis and ultimately concluded that the *Betts v Brady* Court had mistakenly analyzed the precedents before it. 50 In reaching its decision the Court quoted:

> We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution. 51

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37. *Id.* at 344–45.
38. *Id.* at 336.
39. *Id.* at 336–37.
40. *Id.* at 337.
41. Gideon, 372 U.S. at 337.
42. See *id*.
43. *Id*.
44. *Id*.
45. *Id*.
46. *Id.* at 338.
47. *Gideon*, 372 U.S. at 338.
48. *Id*.
49. *Id.* at 341.
50. *Id.* at 342.
51. *Id.* at 343 (quoting Grosjean v. Am. Press Co., 297 U.S. 233, 243–44 (1936)).
To elevate its position it quoted again:

The assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.’\textsuperscript{52}

With these quotations as evidence the Court proceeded to state that the \textit{Betts v. Brady} Court indeed had misinterpreted past precedent and should be overruled.\textsuperscript{53} In explanation of their ruling, the Court said:

In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.\textsuperscript{54}

This seems quite elementary now. However, indigents were not provided the assistance of counsel for any charge less than a capital offense a mere fifty-one years ago.

\section*{III. THE DEBATE OVER PUBLIC DEFENDER ELECTIONS}

Immediately following this case, Florida established the office of the Public Defender.\textsuperscript{55} Peculiarly, Florida chose to elect its public defenders instead of having either a committee or the governor appoint them.\textsuperscript{56} Interestingly enough, the landmark case of \textit{Gideon v. Wainwright} was a Florida born case, yet Florida is one of the few distinct states that still elects its public defenders.\textsuperscript{57} As to the reasons for the election system, there are two distinct arguments that must be evaluated to understand why Florida elects its public defenders.

\subsection*{A. THE ARGUMENT FOR ELECTIONS}

The Florida Supreme Court has stated that an indigent defendant is allowed effective assistance of counsel free from conflict.\textsuperscript{58} As a safeguard to this system, the argument in favor of electing public defenders is that a

\begin{itemize}
\item \textsuperscript{52} \textit{Id.} at 343 (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938)).
\item \textsuperscript{53} \textit{Gideon}, 372 U.S. at 345.
\item \textsuperscript{54} \textit{Id.} at 344.
\item \textsuperscript{55} \textit{Wright}, supra note 4, at 814.
\item \textsuperscript{56} \textit{See} FLA. CONST. art. V, § 18.
\item \textsuperscript{57} \textit{See} Wright, supra note 4, at 814.
\item \textsuperscript{58} Hunter v. Florida, 817 So. 2d 786, 791 (Fla. 2002).
\end{itemize}
system without elections would cause the public defender to have a major conflict between vigorously representing his client and working in his capacity as an appointed state officer. However, in most other states, public defenders are appointed either by a governor or a committee established by the state. This being so, the argument still has some legal muster. In discussing judicial elections, the Indiana Supreme Court stated:

The security of human rights and the safety of free institutions require freedom of action on the part of the court. Courts from time immemorial have been the refuge of those who have been aggrieved and oppressed by official and arbitrary actions under the guise of governmental authority. It is the protector of those oppressed by unwarranted official acts under the assumption of authority. Our sense of justice tells us that a court is not free if it is under financial pressure, whether it be from a city council or other legislative body, in the consideration of the rights of some individual who is affected by some alleged autocratic or unauthorized official action of such a body. One who controls the purse strings can control how tightly those purse strings are drawn, and the very existence of a dependent. Justice, as well as the security of human rights and the safety of free institutions requires freedom of action of courts in hearings cases of those aggrieved by official actions, to their injury.

These observations can be extended to election of public defenders. The basic idea is that while being an appointee of the state, the public defender cannot adequately and vigorously serve his client because of his interest in getting reappointed. The public defender is in an adversarial position, an opposite party to the state attorney in every case in which he serves, thus if he were worried about his appointment from the government this could be a real conflict.

Public Defenders can also be seen as checks and balances on an imperfect justice system. Howard Finkelstein, the Public Defender for the seventeenth judicial circuit, is an example of these checks and balances. On June 13, 2011, Mr. Finkelstein wrote a letter to Jack Smith, the Chief of the Public Integrity System for the Department of Justice. Finkelstein’s office became aware of some corruption taking place in the Broward

60. Wright, supra note 4, at 812–13.
62. See Crist, 978 So. 2d at 147.
63. Id.
65. Id.
66. Id.
Sheriff’s Office (“BSO”). In his letter, he told Mr. Smith of this corruption. He stated that the State Attorney’s office had failed to prosecute employees of the BSO on several occasions. According to Finkelstein, the State Attorney’s office would not prosecute the employees of the BSO without evidence of corroboration and the reasonable chance of a conviction. This alleged violation of law and duty by both the State Attorney’s office and the BSO was brought to light by Mr. Finkelstein. It would appear unlikely that he would have written this letter had he been an appointed official. However as an elected official, Mr. Finkelstein had no conflict of interest to prevent him from writing this letter. This is an ability that most likely would not be in place if he was not elected. The supporters of an election system for the public defender’s office rally behind one central theme. This theme is that a fair adversarial system must be free from ineffectiveness of counsel and thus cannot involve the appointment of the public defenders.

B. THE ARGUMENT AGAINST ELECTIONS

Florida is one of the only states in the United States that has an election system for its public defender offices. Appointment is the way that the majority of public defender offices are filled. The most common method that these appointments are made is by a judicial committee board. The next most common method is appointment by a governor or other state elected official.
Most states choose to appoint rather than elect for a number of reasons.80  One of the biggest reasons states choose to appoint is a matter of public policy.81  A challenger running against an incumbent public defender needs to have a campaign in order to get the public to vote for him.82  This is a pretty basic statement of how our election system works, but the campaign strategy of a public defender is not an easy task.83  How is one to run against the incumbent without seemingly affecting the adversarial system?  For example, what platform would one use to point out the flaws of the incumbent and then show the ways they would fix it?84  However, all throughout Florida people are constantly challenging the incumbents for their offices.85  Over the course of the public defender system’s existence in the state of Florida, there have been a number of platforms that have been initiated by the challenging party.86  An example of a platform that turned out to be quite offensive to the adversarial system was that of the challenger in the 2008 elections for Jacksonville’s public defender’s office.87  The challenger allegedly promised the fraternal order of police that a policeman’s integrity would no longer be challenged by a public defender in court.88  The challenger had the fraternal order’s support and was elected to the office.89  Almost immediately after being elected, the challenger fired ten very experienced attorneys within the public defender’s office.90  This action was obviously against the adversarial system because a public defender is supposed to act in the best interest of his clients and by making this promise, the challenger was clearly in violation of it.91

Another example of a platform that has been used is the destruction of an incumbent’s reputation as in the case of Richard Jorandby.92  In 2000, Jorandby was the incumbent running against the challenger Carey

80.  Id. at 803–04.
81.  See Wright, supra note 4, at 823–24.
82.  See id. at 804.
83.  See David Oscar Markus, Public Defender Elections, SOUTHERN DISTRICT OF FLORIDA BLOG (Dec. 1, 2008, 4:46 PM), http://sdfla.blogspot.com/2008/12/public-defender-elections.html; see also Wright, supra note 4, at 804 (noting that the campaign strategy of a public defender is more difficult than that of a prosecutor since the public defenders are “bound at every turn by their professional responsibilities” among other things).
84.  See Markus, supra note 83; see also Wright, supra note 4, at 804.
85.  See Markus, supra note 83; see also Wright, supra note 4, at 816.
86.  See Wright, supra note 4, at 816.
87.  Markus, supra note 83.
88.  Id.; Wright, supra note 4, at 821.
89.  Id.
90.  Markus, supra note 83.
91.  Wright, supra note 4, at 821 (asserting that challengers have promised voters that they “will refrain from using certain defense techniques in future cases”).
92.  See id. at 817.
Haughwout. Jorandby had maintained the public defender office for nearly two decades. He lost the race because two of his aides came forward and claimed that he had threatened to fire them if they did not contribute ten thousand dollars to his campaign. Haughwout maintained that her campaign slogan had been efficiency in running the office but this piece of information somehow materialized right before the election. In fact, it was this information that destroyed Jorandby’s reputation and dealt the decisive blow in the election’s result.

An additional example of a platform is where incumbents state that the challenger does not have the managerial skills needed to run an office. On the other side, the challenger says that the incumbent does not know the needs of the public because he spends too much time managing and not enough time in the courtroom. Also, there are plenty of campaigns that point to the moral integrity of the candidates and not to their policies or positions. There are even campaign themes that imply favoritism from the incumbent. Another very controversial tactic is where the challenger promises to have higher turnover of attorneys that will lead to lower salaries. These, however, are just a few of the examples that many platforms are based upon. These campaign themes and the election process in and of itself are exactly the reasons why a public defender being elected is not a good idea.

Another public policy argument is that if the election system remains, a “race to the bottom” could occur. This theory is basically that a challenger to an incumbent in a public defender election race will promise

93. Id.
95. Id.
96. Id.
97. Id.
99. See Levesque, supra note 98.
100. See, e.g., Gary Fineout, 5 Accused in Election Probe, MIAMI HERALD, Dec. 7, 2004, at 3B.
101. See David Sommer, Dillinger, Angelis fight to be defender, TAMPA TRIBUNE, Sept. 2, 2000, at 1.
103. Wright, supra note 4, at 822.
less vigorous defense of criminals while he is in office.\textsuperscript{104} This may help him to win the election.\textsuperscript{105} The news of this strategy will reach other challengers and they will do the same thing during the next election.\textsuperscript{106} This will culminate with the public defender’s office being nothing more than a mirage of a defense because all its tactics will be off limits.\textsuperscript{107} This would be detrimental to the adversarial system and ultimately destroy the Sixth Amendment to the Constitution’s guarantee to effective assistance of counsel.\textsuperscript{108}

IV. ANALYSIS

In order to determine the legality of these arguments it is imperative to examine what exactly is the meaning of “ineffectiveness of counsel.”\textsuperscript{109} In \textit{Strickland v. Washington},\textsuperscript{110} the Supreme Court of the United States set out the criteria that are to be considered by a court when it decides whether counsel gave his client effective assistance.\textsuperscript{111} The Court explained that a fair trial is one where evidence, which is subject to scrutiny by adversarial parties, is presented to an impartial decision maker in order to resolve issues that were defined preceding the trial.\textsuperscript{112} The Court went on to say that assistance of counsel is crucial to this process because the defendant will need the counsel’s wisdom and knowledge to be able to effectively defend himself against the prosecution’s charges.\textsuperscript{113} Then the Court elaborated on the right to effective assistance of counsel by stating: “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”\textsuperscript{114} Following this statement, the Court set the standard for capital cases, all federal cases, and any case that might be presented for review.\textsuperscript{115} For a capital case the Court set out two criteria.\textsuperscript{116} First, the defendant must

\begin{itemize}
\item \textsuperscript{104} \textit{Id.}
\item \textsuperscript{105} \textit{Id.}
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} \textit{See id.}
\item \textsuperscript{108} \textit{See Wright, supra note 4, at 822; see U.S. CONST. amend. VI.}
\item \textsuperscript{109} \textit{See Strickland v. Washington, 466 U.S. 668, 686 (1984).}
\item \textsuperscript{110} \textit{Id.}
\item \textsuperscript{111} \textit{Id. at 687–88.}
\item \textsuperscript{112} \textit{Id. at 685.}
\item \textsuperscript{113} \textit{Id. (citing Adams v. United States ex rel. McCann, 317 U.S. 269, 275–76 (1942); Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).}
\item \textsuperscript{114} \textit{Id. at 686.}
\item \textsuperscript{115} \textit{Strickland, 466 U.S. at 687–88.}
\item \textsuperscript{116} \textit{Id. at 687.}
\end{itemize}
prove that his counsel was deficient.\textsuperscript{117} A showing of deficiency has to be serious enough that it took from the defendant the guarantee of counsel made by the sixth amendment.\textsuperscript{118} Second, the defendant must show that this deficiency prejudiced his defense.\textsuperscript{119} Both of these criteria must be fulfilled by the defendant in order to show a breakdown of the adversarial system and to obtain the relief he seeks.\textsuperscript{120} The Court further explained that in all federal cases the standard for a court to determine an attorney’s performance is that of “reasonably effective assistance.”\textsuperscript{121} This means that when a defendant makes a claim of ineffectiveness of counsel he has to prove that the attorney went below an objective standard of reasonableness.\textsuperscript{122} Thus the proper standard is “simply reasonableness under prevailing professional norms.”\textsuperscript{123}

These standards are the only guidelines the Supreme Court of the United States gives to evaluate an ineffectiveness of counsel claim.\textsuperscript{124} The Court explains that it would be impossible to give more insight into the specific guidelines that constitute reasonably effective attorney performance.\textsuperscript{125} Because the standard is one of reasonableness, how the standard should apply varies on case-by-case basis.\textsuperscript{126} If the Court were to attach specific guidelines it would come close to violating the guarantee of effectiveness of counsel and possibly violate it.\textsuperscript{127} In a case-by-case comparison it is impossible to say exactly what the minimal requirements would be for an attorney to give effective assistance.\textsuperscript{128} According to the Court, when a court is presented with a claim of ineffectiveness of counsel, that court must be highly deferential to the counsel’s performance.\textsuperscript{129} The Court addresses the fact that when looking back at what counsel did during the course of a trial it be would very easy after knowing the outcome of the trial to critique the counselor.\textsuperscript{130} The Court stated that there is a presumption that whatever counsel did during the trial was “sound trial

\begin{itemize}
\item[\textsuperscript{117}] Id.
\item[\textsuperscript{118}] Id.
\item[\textsuperscript{119}] Id.
\item[\textsuperscript{120}] Id.
\item[\textsuperscript{121}] Strickland, 466 U.S. at 687 (citing Trapnell v. United States, 725 F. 2d 149, 151–52 (2d. Cir.1983)).
\item[\textsuperscript{122}] Id. at 687–88.
\item[\textsuperscript{123}] Id.
\item[\textsuperscript{124}] Id. at 688–89.
\item[\textsuperscript{125}] Id.
\item[\textsuperscript{126}] Id. at 689.
\item[\textsuperscript{127}] See Strickland, 466 U.S. at 689.
\item[\textsuperscript{128}] See id.
\item[\textsuperscript{129}] Id.
\item[\textsuperscript{130}] Id.
\end{itemize}
strategy.131 There are many ways to represent a defendant and during the course of a trial even the most competent defense attorneys might choose a tactical plan that similar competent attorneys would not agree is a good decision.132

In order to gain a deeper understanding of what the Court looks for when it is evaluating what is reasonable effective assistance of counsel it is important to study a few examples. In Cuyler v. Sullivan,133 the claim of ineffectiveness of counsel was based on a conflict of interest.134 The defendant made a claim that his counsel rested his case because he did not want to expose other witnesses that were going to testify for some of the co-defendants.135 The Court stated that the mere possibility of a conflict of interest was not sufficient grounds to reverse a conviction.136 Instead, the Court said that the defendant must show there is a conflict of interest and then show that this conflict of interest prejudicially affected his trial.137

In Brooks v. Tennessee,138 the Court held that a state statute was unconstitutional because it forced the defendant to testify first in trial, if he chose to testify.139 The Court explained that a defendant’s decision to testify is both a tactical decision and one protected by the constitution.140 The penalty for not testifying first, according to the statute in question, was that the defendant was precluded from testifying at all.141 The Court held that by keeping the defendant off the stand unless he testified first, the state violated the defendant’s right to assistance of counsel.142 All these cases focus on what the attorney or the state actually did during the trial.143 Not one of the cases mentioned above, nor any case that the Supreme Court of the United States has reviewed based on a claim of ineffectiveness of counsel, has dealt with the office in which the attorney worked. Therefore, the argument in favor of elections is very shaky at best. There is absolutely no case law in the federal system that deals with this issue because it is not an effective legal argument.

131. Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).
132. Id.
134. Id. at 349.
135. Id. at 350.
136. Id.
137. Id.
139. Id. at 612–13.
140. Id. at 612.
141. Id.
142. See id. at 613.
A. **THE FLORIDA SUPREME COURT’S OPINION**

Similar to the federal system, the state of Florida does not have any case law to support the argument for elections.\(^\text{144}\) In fact, the Florida Supreme Court addressed this issue in one of its fairly recent decisions.\(^\text{145}\) The legislature of the State of Florida created a bill designed to help public defenders when they had a conflict of interest.\(^\text{146}\) This law created the OCCCRC.\(^\text{147}\) It was designed to allow the withdrawal of a public defender in a case where there were multiple defendants and a conflict of interest was created by the public defender representing both co-defendants.\(^\text{148}\) The peculiar thing about this office is that the legislature designed the regional conflict counsel to be appointed:

Each regional counsel must be, and must have been for the preceding 5 years, a member in good standing of The Florida Bar or a similar organization in another state. Each regional counsel shall be appointed by the Governor and is subject to confirmation by the Senate. The Supreme Court Judicial Nominating Commission shall recommend to the Governor three qualified candidates for appointment to each of the five regional counsel positions. The Governor shall appoint the regional counsel for the five regions from among the recommendations, or, if it is in the best interest of the fair administration of justice, the Governor may reject the nominations and request that the Supreme Court Judicial Nominating Commission submit three new nominees. The regional counsel shall be appointed to a term of 4 years, the first beginning on July 1, 2007. Vacancies shall be filled in the same manner as appointments.\(^\text{149}\)

Effectively, the legislature created a non-constitutional officer to fulfill duties extremely similar to that of a public defender.\(^\text{150}\) The Florida Association of Criminal Defense Lawyers, Inc. (“FACDL”), brought suit as soon as this bill was signed into law declaring this office to be unconstitutional.\(^\text{151}\) The Florida Supreme Court had to review this bill in its entirety to determine whether it was constitutional.\(^\text{152}\)

\(^{144}\) See e.g., Crist v. Florida Ass’n of Crim. Def. Lawyers, Inc., 978 So. 2d 134, 141–42 (Fla. 2008) (summarizing the existing case law in Florida prior to Crist).

\(^{145}\) Id. at 137.

\(^{146}\) Id. at 138.

\(^{147}\) Id. at 137.

\(^{148}\) FLA. STAT. § 27.511(5) (2013).

\(^{149}\) FLA. STAT. § 27.511(3) (emphasis added).

\(^{150}\) See id.


\(^{152}\) Id. at 139–48.
The first issue that was presented to the court was whether this statute went against the expressed language of the Florida Constitution. The Court first looked at the plain language of the public defender statute: In each judicial circuit a public defender shall be elected for a term of four years, who shall perform duties prescribed by general law. A public defender shall be an elector of the state and reside in the territorial jurisdiction of the circuit and shall be and have been a member of the Bar of Florida for the preceding five years. Public defenders shall appoint such assistant public defenders as may be authorized by law.

The court then found that there were three fundamental requirements set by the legislature for the public defender. The requirements are: (1) each judicial circuit shall have one public defender; (2) the public defender must be elected for a term of four years; and (3) the public defender must be an elector of the State, reside in the territorial jurisdiction of the circuit in which he or she is elected, and be a member in good standing of The Florida Bar for the preceding five years.

The court then stated that there was nothing in the Florida Constitution besides this section that gave any insight into the specific duties of a public defender. Aside from this section the way a public defender was to operate was not designated by the constitution. The only thing the court ruled was “clearly and unequivocally” stated by the constitution was that the legislature had the authority to control what types of cases the public defender was allowed to defend. Therefore, the OCCCRC could logically defend cases that the legislature deemed were unfit for the public defender. The court’s reasoning led to the next logical issue: if the legislature had created a second public defender’s office, this would not be constitutionally correct because the court had already determined there was an expressed intent by the legislature to have only one public defender per judicial district.
The court then had to decide whether this piece of legislation effectively created a second public defender’s office. The FACDL alleged that because the legislature had referred to the OCCCRC as a public defender when describing how it would be funded, the legislature had actually said the OCCCRC was a second public defender. The court rejected this assertion and stated that the legal character of the OCCCRC should be defined by what the OCCCRC actually does and not by what it is referred to for funding purposes. Specifically, the Court looked at the duties of the OCCCRC as compared to the duties of the public defender. The Court then said that there was no difference in the type of cases that both the OCCCRC and the public defender would handle. The Court then analyzed the specific duties of the OCCCRC. It noted that the OCCCRC only steps in and takes cases that create a conflict of interest for the public defender. Therefore, it would be impossible for the OCCCRC to be a second public defender’s office. By virtue of the fact that the OCCCRC only represents clients that the public defender cannot represent, the OCCCRC does not undertake the same duties as a public defender. Thus, the Court concluded that the OCCCRC was not a second public defender’s office.

At the conclusion of its analysis of this issue, the court had to address the assertion made by the FACDL that the OCCCRC was not constitutionally viable because it lacked the independence of an elected official. First, the court noted the FACDL had not cited any case law to bolster its argument. The fact the FACDL did not provide any support suggests that its arguments were weak. Next, the court looked at its past precedent on the issue. The court started off reiterating its past ruling that “[t]he state is constitutionally obliged to respect the professional

163. See Crist, 978 So. 2d at 142–43.
164. Id. at 144–45.
165. Id. at 145.
166. Id.
167. Id.
168. See id.
169. Crist, 978 So. 2d at 145.
170. Id. at 145–46.
171. See id. at 146.
172. Id. at 148.
173. Id. at 146–47.
174. Id. at 147.
175. See Crist, 978 So. 2d at 147 (noting the lack of supporting evidence and case law in support of FACDL’s argument).
176. See id. at 147–48.
independence of the public defenders whom it engages.”177 This statement stands for the proposition that by constitutional decree the state of Florida must take the independence of the public defenders as a serious matter.178 The court then quoted from the Supreme Court of the United States:

His [the public defender’s] principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.179

Indeed the court considers the independence of a public defender to be one of the most important characteristics of the office.180 The court went on to cite from many different cases to show this sense of importance and respect that the court gives to the public defender.181 The court quoted, “the public defender is an advocate, who once appointed owes a duty only to his client, the indigent defendant. His role does not differ from that of privately retained counsel.”182 The court then cited its discussion in Wilson v. Wainwright:

[T]he basic requirement of due process in our adversarial legal system is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law. Every attorney in Florida has taken an oath to do so and we will not lightly forgive a breach of this professional duty in any case . . .183

These examples proffered by the court make it abundantly clear that the court does not consider an elected official any more capable of representing his client than an appointed official.184 The court even specifically stated, “[i]n the context of the Sixth Amendment, effective representation does not depend upon the office structure from which the attorney came or for whom the attorney works, but the actual legal representation provided to the individual client.”185 The court cited Makemson v. Martin County186 to exemplify this statement.187 In this case, the court held that to use of a maximum fee structure for all appointed

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177. Id. at 147 (quoting State ex rel. Smith v. Brummer, 426 So. 2d 532, 533 (Fla. 1982)).
178. See id.
179. Id. (quoting Ferri v. Ackerman, 444 U.S. 193, 204 (1979)).
180. Id.
181. See Crist, 978 So. 2d at 147.
182. Id. (quoting Schreiber v. Rowe, 814 So. 2d 396, 398 (Fla. 2002)).
183. Id. (quoting Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985)).
184. Id.
185. Id.
186. Makemson v. Martin Cnty., 491 So. 2d 1109, 1112 (Fla. 1986).
counsel was unconstitutional as applied. The court stated that a public defender might vary his amount of preparation for trial depending on the circumstances of the case. This variation makes it impossible for a statute to project what the maximum fee must be for any type of case. If the statute were applied, court appointed defense counsel could not give his client effective assistance of counsel if his costs exceeded the maximum allowable. Thus, the court concluded that the statute was unconstitutional because it caused ineffective assistance of counsel.

Similarly, in Schommer v. Bentley, the court looked at the actual assistance of the counsel given to the defendant. The same was held true in the case of Olive v. Maas where the court looked at the assistance given by counsel and not what position he held. All these examples point to the way that the Florida Supreme court approaches the effective assistance of counsel debate. The court does not look at what office the counselor is from, but instead looks at the actual legal assistance the counselor gives to his client. In other words, “it is not the form of representation that implicates the Sixth Amendment, but rather a question of whether the representation itself is effective.” Thus, the creation of the OCCCRC was deemed by the Florida Supreme Court not to be a violation of the Sixth Amendment’s guarantee to the right to have effective assistance of counsel.

B. THE FLORIDA BAR

Every attorney who is admitted to the Florida Bar is held to a professional standard of ethics specifically designed by the Florida Bar. In order to be admitted, an attorney must take an oath and be sworn in by a

188. Makemson, 491 So. 2d at 1112.
189. See id. at 1114.
190. Id. at 1115.
191. See id. at 1114.
192. Id. at 1114–15.
193. Schommer v. Bentley, 500 So. 2d 118 (Fla. 1986).
194. See id. at 120.
196. Id. at 654.
198. Id. at 146–47.
199. Id. at 148.
200. Id.
judge within ninety days of passing the bar examination.202 The attorney must state in this oath that:

[He or She] will not counsel or maintain any suit or proceedings which shall appear to [him or her] to be unjust, nor any defense except such as [he or she] believe to be honestly debatable under the law of the land; [he or she] will employ for the purpose of maintaining the causes confided to [him or her] such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law; [he or she] will maintain the confidence and preserve inviolate the secrets of [his or her] clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval . . . [he or she] will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which [he or she is] charged . . . .203

These words are a clear indication of what is required by the state of Florida for any individual to become a member of its bar.204 It is clearly evident that when an individual is accepted into the Florida Bar they are no longer allowed to act as a layman, in ignorance of the law.205 More importantly they are not allowed to take any “compensation in connection with their business except from [their client] or with their knowledge and approval.”206 This oath is proof that any person who becomes a Florida Bar member, which is a pre-requisite to being a public defender, is bound by an oral contract to not let any sort of compensation or influence affect their vigorous defense of their client.207 Furthermore, the oath requires that the attorney “will never seek to mislead the judge or jury by any artifice or false statement of fact or law.”208 If an attorney is influenced by his office to alter or amend a certain defense at trial, it would be a direct violation of this oath.209 This oath is not something that the bar of the state of Florida

203. Oath, supra note 201.
204. Id.
205. See id.
206. Id.
207. See id; see also FLA. CONST. art. V § 18 (requiring an elected public defender to have been a member of the Florida Bar for at least five years prior to election).
208. Oath, supra note 201.
209. See id.
takes lightly. A lawyer who violates this oath may be subjected to sanctions and possibly disbarred. Therefore, a public defender who is swayed by his appointment is in violation of the oath and could be disbarred. Logically, this factor alone should be enough of a deterrent to accurately say that a public defender would not be swayed by his appointing office and would therefore not have a conflict of interest due to his appointment.

In addition to the oath that is taken by every attorney admitted to the bar in the state of Florida, every attorney who practices law in the state of Florida is subject to the bar of Florida’s jurisdiction. This means that every attorney who practices law in the state of Florida is subject to the Florida Bar’s standards of conduct.

The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney’s relations as an attorney or otherwise, whether committed within or outside the state of Florida, and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline.

A lawyer who is practicing in the state of Florida must adhere his conduct to this description of professional conduct. A lawyer in the state of Florida who commits an act “contrary to honesty and justice,” may be subjected to discipline by the bar of the state of Florida. This statement seems quite obvious but goes against the notion that a public defender could not vigorously defend his client if he were appointed. Therefore, the argument for elections is logically inconsistent with the professional standard that lawyers in Florida are required to adhere to. Furthermore, an attorney who violates this standard would be subjected to discipline and possibly disbarment.

211. See id. at 283–85.
212. See Oath, supra note 201.
214. Id. at 281–82.
215. Id. at 281–82.
216. Id. at 282.
217. See id.
218. Id.
220. See id.
221. Id.
C. THE MAJORITY APPOINTS

Another reason that strengthens the argument against electing public defenders is that the majority of jurisdictions appoint them.222 This fact seems quite simple but it is interesting to note that not one Supreme Court of the United States opinion has dealt with a conflict of interest where the primary claim was that the public defender was appointed. In addition, this fact suggests that this argument put forth by supporters of elections for public defender offices is not only weak but also has no backing.223 Therefore, this system of elections must be changed as quickly as possible.

V. CONCLUSION

Florida’s public defender election system needs to be changed to fall in line with the rest of the country.224 As a matter of public policy, the campaign themes and general behavior of the election system is not good for the public.225 This race to the bottom approach that could take hold of the public defender campaigns could seriously impair the court system of Florida.226

Also, adherence to the guarantee of the Sixth Amendment does not require elections of public defenders.227 This argument for elections is not legally consistent. Ineffectiveness of assistance of counsel has never been claimed purely based on the office from which an attorney was employed.228 The Florida Supreme Court specifically states the premise for this argument and completely refutes it.229 In fact the Supreme Court of Florida uses examples from the Supreme Court of the United States to bolster this argument.230 The Supreme Court of the United States has consistently held that a public defender, like any other attorney, is required to perform a professional duty in line with the oath that he or she took when they were barred by their respective states.231 The Florida Supreme Court goes on to say that the argument for elections being part of the guarantee of the Sixth Amendment of the Constitution has no backing

222. Wright, supra note 4, at 812.
224. See Wright, supra note 4, at 812.
225. Id. at 822.
226. Id.
227. Crist, 978 So. 2d at 146–47.
228. See e.g., Strickland v. Washington, 466 U.S. 668, 690 (1984) (stating what the court must analyze while looking at the challenged conduct).
229. Crist, 978 So. 2d at 148.
230. See id. at 147 (quoting Polk County v. Dodson, 454 U.S. 312 (1981)).
231. Id.
because there is no case law to support it. It also states that the OCCCRC is allowed under the Florida constitution. The Florida Supreme Court is basically saying that even under the constitutional provision that addresses the qualifications of the public defender, there is not a constitutional argument to keep the legislature from creating an office which, in the form of its duties, does the same thing as a public defender. In other words, the Florida Supreme Court is basically suggesting that there is no legal reason why public defenders should be elected. Therefore if there is not a reason for the elections, and the majority of jurisdictions appoint their public defenders, it is logically consistent to state that Florida should become in line with this majority view.

Furthermore, the Florida Bar has a professional standard to which all attorneys who practice in the state of Florida must comply with. This professional standard requires all attorneys, including public defenders, not to maintain trial and legal claims that are not “contrary to honesty and justice.” This is yet another reason why an elected official would be no more likely than an appointed official to promote the Sixth Amendment’s guarantee to effective assistance of counsel free from conflict.

The issue then becomes how can Florida change its system of electing public defenders? This question is easily answered by Florida’s own constitution. There are five ways to modify Florida’s constitution. It can be modified either by (1) a proposal by the legislature with a joint resolution, (2) a proposal by a Constitution Revision Commission, (3) a proposal by a Tax and Budget Reform Commission, (4) a proposal by citizen initiative, or (5) a proposal by a constitutional convention. A proposal by the legislature is the most logical way that this could happen. A member of either house of the legislature would just have to propose an amendment to the constitution and then it would be voted on. In order to pass, three-fifths of both the houses would have to vote to make the bill a

232. Id.
233. Id. at 148.
234. Id. at 146.
235. Crist, 978 So. 2d at 147.
237. Id. at 282.
238. See U.S. CONST. amend. VI.
239. Fla. Const. art. XI. (showing the various ways to amend the Florida Constitution).
241. Id.
243. Id.
A proposal by the Constitution Revision Commission would be one of the slowest methods to get an amendment to the constitution. This method would be slow because a Constitution Revision Commission will not meet again until 2017. A Constitution Revision Commission only meets once every twenty years. This was designed as a check and balance procedure by the legislature into the constitution in order to keep up with the times. A proposal by a Tax and Budget Reform Commission would be the slowest way to amend the constitution. Like the Constitution Revision Commission, the Tax and Budget Reform Commission meets once every twenty years. However, the last time the Tax and Budget Reform Commission met was in 2007. This means that the Tax and Budget Reform Commission will not meet again until 2027. Nevertheless, this is another possible way to amend the constitution. A proposal by citizen initiative is another route that could be taken to amend the constitution. This option gives the power to the voters of the state of Florida. This option starts with the filing of the proposed amendment with the custodian of state records in a petition. This petition must be signed by:

a number of electors in each of one half of the congressional districts of the state and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.

The next option available is a proposal by a constitutional convention. This is another public option where the action to be taken is left to the people of Florida. In order to form this convention a petition

244. Id.
245. FLA. CONST. art. XI, § 2.
247. Id.
248. See FLA. CONST. art. XI, § 2.
249. FLA. CONST. art. XI, § 6(a).
250. Id.
251. Id.
252. See id.
253. Id.
254. FLA. CONST. art. XI, § 3.
255. Id.
256. Id.
257. Id.
258. FLA. CONST. art. XI, § 4(a).
259. Id.
must be filed with the custodian of state records. This petition must contain a declaration that a constitutional convention is desired. The petition must be signed by:

- a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to fifteen percent of the votes cast in each such district respectively and in the state as a whole in the last preceding election of presidential electors.

The proposed convention is then voted on at the next general election. If the amendment passes, the voters of Florida can vote to elect representatives be on the convention at the next general election. There is one member for each district that there is an elected representative in one of the two houses. Then after the convention is formed, the representatives decide and propose an amendment to the constitution not less than ninety days before the next general election. After any of these five options, the amendment is then proposed to the voters of the state of Florida at the next general election. However, before this amendment is put on the general election ballot to be voted, it must be published in a newspaper of general circulation in each of the judicial districts. Finally, the amendment is voted on by the voters of the State of Florida and if sixty percent of the voters affirm the amendment, then the constitution will be amended. Regardless of the form in which the amendment is passed, the revision or amendment is then presented to the electors and if more than sixty percent of the voters vote for it, the constitution is changed to reflect the revision or amendment.

In conclusion, the Florida Supreme Court has specifically addressed the argument for elections and clearly refuted its premise. It is time that the Florida constitution be changed to reflect this opinion. Today is the day, for the state of Florida to come into league with the majority of the

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260. Id.
261. Id.
262. Id.
264. Id.
265. See id.
266. Id.
269. Fla. Const. art. XI, § 5(e).
jurisdictions that appoint their public defenders. It is a matter of public policy that the legislature make the office of the public defender appointed by whatever means it sees fit. This could easily be done by amending the Florida constitution. Any of the five options that are drafted in the constitution could be used to amend the constitution. In order for the interests of the public to be satisfied, it is imperative that this amendment be done as soon as possible.

273. Wright, supra note 4, at 812.
274. See Markus, supra note 83.
275. See Fla. Const. art. XI.
276. Id.
277. See Wright, supra note 4, at 822.