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IN THE
SUPREME COURT OF FLORIDA

IN RE: The Recall of
BARNEY KORETSKY, as Mayor of
Pembroke Park, Florida.

_____/

CASE NO. 74 280

SARAH PHELPS, Chairwoman of the
RECALL COMMITTEE, THE TOWN OF
PEMBROKE PARK,

Petitioner/Appellee,

v.

BARNEY KORETSKY,

Respondent/Appellant.

_____/

ON DISCRETIONARY REVIEW FROM THE FOURTH
DISTRICT COURT OF APPEAL - CASE NO. **89-0488**

RESPONDENT'S ANSWER BRIEF ON THE MERITS

JOSEPH H. WEIL, ESQUIRE
Co-Counsel for Barney Koretsky
~~S.W. 109th Avenue~~
~~Sweetwater, Florida 33174~~
(305) 895-6366
Fla. Bar No. **085675**

CATHERINE RAFFERTY, ESQUIRE
MILLER, SQUIRE & RAFFERTY, CHARTERED
Attorneys for Barney Koretsky
500 Northeast Third Avenue
Fort Lauderdale, Florida **33301**
(305) 764-3211
Fla. Bar No. **348872**

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STATEMENT OF THE CASE AND FACTS

The Petitioner, SARAH PHELPS, initiated recall proceedings against Barney Koretsky, Mayor of the Town of Pembroke Park, on two separate occasions by having petitions for recall circulated among the electors. The first recall petition was invalidated by the Circuit Court, and that petition is not an issue here. Mayor Koretsky filed his defensive statement to the second recall petition pursuant to Section 100.361 Fla. Stat (1987), and a second round of petitions were circulated among the electors for signature. Jane Carroll, the supervisor of elections, certified that both rounds of petitions contained the requisite number of signatures under the statute. The Mayor filed a complaint seeking to invalidate the second recall petition which action fell in a different division than that involved here. That complaint was ultimately dismissed.

This action was commenced in the trial court below by an informal request by the acting Deputy Clerk of the Town of Pembroke Park to the Chief Judge for a "meeting" regarding setting an election date for the recall of Mayor Koretsky. Counsel for the Respondent, Petitioner and the Town were all present. The "meeting" was immediately followed by the petition of Sarah Phelps requesting a recall election date **(A.l)** and the order setting the election for March **14, 1989 (A.3).** On February **17, 1989,** Mayor Koretsky appealed that order. **(A.4)**

Several attempts were made by counsel for petitioner and counsel for the Supervisor of Elections to either clarify the

application of the automatic supersedeas under Rule 9.310(b)(2) Fla.R.App.P. or to vacate the stay. That relief was denied by both the trial and appellate courts. (A.58, 142, 184-186, 192)

On Petitioner Phelp's request, the Fourth District Court of Appeals relinquished jurisdiction to the trial court to entertain a motion to correct an alleged scrivener's error. That order was entered March 2, 1989 and the trial court order granting the motion was entered March 6, 1989. (A.57) Again on Petitioner's request the Fourth District relinquished jurisdiction to the trial court to make those orders necessary to carry out the recall election within the time frame specified by statute. The second relinquishment order was entered March 14, 1989, and the trial court order entered pursuant thereto was signed March 17, 1989. (A.99) This order reset the election date to April 25, 1989 and provided for notice of the election and qualifying periods for candidates to fill the possible vacancy, among other things. On March 20, 1989, Mayor Koretsky filed his amended notice of appeal to the Fourth District adding the March 6 and 17 orders as matters to be reviewed. (A.102)

As a result of the Mayor's appeal, the District Court of Appeal issued a Constitutional Writ staying the election and its opinion reversing the trial court order, on the basis that there is no legal authority for a recall election in the Town of Pembroke Park. (A.104)

The District Court of Appeals certified as a question of "great public importance" to this court the following:

> Do the provisions of Section 100.361 apply to a municipality which has

adopted no provisions for recall elections?

Petitioner now seeks to have this court review that decision.

Although the Fourth District ruled on only one issue presented by the Mayor, alternative grounds for reversing the trial court orders were argued to that court. As the trial court was reversed, the appellate court did not need to address the other issues. However, all arguments will be presented here for the event that this court takes a different opinion than the Fourth District Court of Appeal.

SUMMARY OF ARGUMENT

The Chief Judge in the Trial Court was in error in setting a recall election date for the Mayor of Pembroke Park as the town's charter does not provide for recall elections. The provision in Section 100.361(9) Fla. Stat. (1987) that the act "shall apply to cities and charter counties which have adopted recall provisions" must be interpreted to mean it does not apply to cities which have not adopted recall provisions. This interpretation is mandated by the statutory construction doctrine that the mention of one thing implies the exclusion of another, and the overall format and scheme of this and other election statutes.

An interpretation that subsection (9) merely calls for the statutory provisions to supercede charter provisions would render the entire subsection meaningless as that purpose is accomplished by subsection (8). As statutes should be construed to give every provision effect, this subsection must be interpreted to mean the recall statute does not apply to cities without recall provisions.

In addition, general home rule powers may only be restricted by express provisions in general law. As the recall statute does not explicitly mandate that all municipalities have recall, municipalities have the right to choose not to have recall elections notwithstanding the procedure statute.

The following arguments were not addressed by the Fourth District Court of Appeals, but are made here for the event this court disagrees with the Appellate Court's answer to the certified question.

Section 100.361 Fla. Stat. provides that any recall election date must be set within the 30 to 60 day period after the Mayor's 5 day resignation period. April 25, 1989, the election date herein, is well after that period. The filing of a notice of appeal cannot toll the window period unless the appeal were decided against the Mayor. *Any* other rule would result in a recall subject being able to prevent an election solely by waiting to file his notice of appeal until the last day. In that case the number of days remaining in the window period would be almost always insufficient for the requisite notice of an election.

Even assuming arguendo that the filing of the notice of appeal tolls the window period, all periods of relinquishment of jurisdiction from this court should be included in the count of days elapsed. During the relinquishment period to correct a scrivener's error, the automatic stay did not operate to preserve the status quo as to the Mayor, as the order setting election date was substantially altered. Accordingly, the argument that a

stay operates to preserve the status quo and therefore tolls the window period for election must fail as to this relinquishment time period.

There is nothing in the recall statute to suggest that the Chief Judge should attempt to bifurcate the recall issues into two separate actions. After the original appeal was taken in this case, a voluntary dismissal was filed in Judge Price's case (complaint attacking sufficiency of the recall petition) based upon the Petitioner's position that the original order setting the election was not a "final order" from which the Mayor could seek review by appeal. The trial court, by virtue of the March **17, 1989** order in which it indicated it could not hear the substantive issues on the recall petition's deficiencies, has denied Mayor Koretsky his right to challenge the legal sufficiency of that recall both as to substance and procedure.

The order entered March 6, **1989,** was in excess of the Chief Judge's jurisdiction as it did more than correct a scrivener's error. The petitioner, in the lower court, requested an election date for the recall of Barney Koretsky, Mayor of the Town of Pembroke Park. She alleged in that petition that the requirements of the recall statute had been met to recall Barney Koretsky from the office of the Mayor of Pembroke Park. **(A.l)** The order on that petition reflected her request. (A.3) There is a substantive difference between recalling a person from the position of Mayor and recalling him from the governing body of a city, which cannot be corrected as a clerical error.

ARGUMENT

A. THE PLAIN MEANING OF THE RECALL STATUTE SUPPORTS THE APPELLATE COURT DECISION THAT IT DOES NOT APPLY TO CITIES WHICH DO NOT HAVE PROVISIONS FOR RECALL.

The intent of the legislature as to the applicability of the recall statute is set forth in the paragraph specifically designated "Provisions applicable." That paragraph provides as follows:

> "The provisions of this act shall apply to cities and charter counties which have adopted recall provisions."

Section 100.361(9) Fla. Stat. (1987). This portion of the statute was drafted as a separate section from the remaining portions of the law in the original enactment. Ch. 74-130 Section 2. Section 1 of the enactment contained the recall procedure, and Section 3 the effective date. The format of the original enactment clearly shows the legislature intended the section quoted above to be a limitation on the operation of the statute. As opined by the District Court of Appeals below, the plain meaning of this section is to limit the application of the procedures section of the statute to the cities and charter counties mentioned therein.

Petitioner argues that the title of the act shows a different intent. The title reads as follows:

> "An act relating to municipal and charter county government recall; authorizing and providing procedures for the recall of any member of the governing body of a municipality or charter county by the municipal or charter county electors; providing

penalties; providing an effective date."

The description of the act as one authorizing and providing procedures for recall elections is consistent with the terms of subsection nine of the codified statute. In the municipalities which have adopted recall provisions, the elections must be conducted as prescribed in the statute. The title however does not indicate a mandate that all municipalities have recall elections.

Petitioner also argues that if the statute is not interpreted to be a mandate, the citizens of a municipality not providing for recall would be powerless to remove a corrupt city official. Such is not the case however, as the state constitution and general law provide other avenues for removal of a municipal official. Article 4, Sec. 7(c) of the Florida Constitution of 1968 provides:

"(c) By order of the governor any elected municipal officer indicted for crime may be suspended from office until acquitted and the office filled by appointment for the period of suspension, not to extend beyond the term, unless these powers are vested elsewhere by law or the municipal charter."

In addition to the constitutional provision, the legislature has provided, by general law, for suspension and removal of municipal officers by the Governor. The grounds for removal are the same as those in the recall statute. Sec. 112.51 Florida Statutes (1987) provides:

"112.51. Municipal officers; suspension; removal from office

> **(1)** By executive order stating the grounds for the suspension and filed with the Secretary of State, the Governor may suspend from office any elected or appointed municipal official for malfeasance, misfeasance, neglect of duty, habitual drunkenness, incompetence, or permanent inability to perform his official duties.
>
> (2) Whenever any elected or appointed municipal official is arrested for a felony or for a misdemeanor related to the duties of office or is indicted or informed against for the commission of a federal felony or misdemeanor or state felony or misdemeanor, the Governor has the power to suspend such municipal official from office.

In addition, the citizens may by referendum initiate a charter amendment for recall even without the cooperation of city officials. Section **166.031,** Fla. Stat. **(1987)**

The "intent" section of the recall statute also supports Respondent's position. Subsection **(8)** indicates the purpose of the statute is to mandate uniform procedures in those municipalities providing for recall, as opposed to requiring elections regardless of charter provisions.

B. STATUTORY CONSTRUCTION RULES IN CONJUNCTION WITH THE NATURE OF HOME RULE POWER DICTATE A FINDING OF LEGISLATIVE INTENT TO LIMIT THE APPLICATION OF THE STATUTE.

Petitioner's second argument involves the opinions issued by the office of the Attorney General and Division of Elections. The District Court of Appeal adopted the Division of Elections Opinion No. **77-10** issued March **22, 1977.** In that opinion, the Division, in disagreement with the Attorney General, took the position that the portion of the statute labeled "Provisions

Applicable" constitutes a limitation on the application of the statute to cities or charter counties which have adopted recall provisions. Subsequently, the Attorney General and Division of Elections issued opinions taking the opposite position.

Petitioner argues that the administrative opinions he supports should be given great weight, particularly since the recall statute has been amended since the opinions on which he relies were issued, with no clarification of the point involved in this appeal.

This argument must fail for two reasons. First, the rule on deference to administrative opinions only applies if the administrative interpretation, construction or application is in conformance with the legislative intent. Public Employees Rel. v. Dade County Police Benevolent Association, 467 So.2d 987, 989 (Fla. 1985), State v. Stein, 198 So.82, 87 (Fla. 1940). As addressed previously, the position urged by Petitioner is not in conformance with the legislative intent as plainly stated in the statute. The early Division of Elections opinions is in conformity with the legislative intent, however.

Secondly, the fact of subsequent amendments is equally supportive of the Mayor's position. The legislature amended the recall statute after the 1977 Division of Elections opinion without change to the "application" or "intent" sections of the statute. Chapter 77-174, Chapter 77-175, Chapter 77-279, Laws of Florida.

Petitioner characterizes the 1977 Division of Elections opinion as being reversed in 1978. These opinions, however, are

not "reversed" in the judicial sense and are not subject to a stare decisis type binding effect. The courts are without jurisdiction to review such an advisory opinion. Sullivan v. Division of Elections, 413 So.2d 109 (Fla. 1DCA 1982). These opinions are only binding on the person or organization who sought the opinion or with reference to whom the opinion was sought. Section 106.23(2), Fla. Stat. (1987)

The Florida Supreme Court in State v. Massachusetts Company, 95 So.2d 902 (Fla. 1956), cited by Petitioner, refused to interpret a statute as abrogating the states rights to wrecked and derelict goods absent an express declaration to that effect in the statute. Id. at 907. In Peninsular Supply Company v. C.B. Day Realty of Florida, Inc., 423 So.2d 500 (Fla. 3rd DCA 1982), a case also cited by Petitioner, the court refused to interpret a mechanic's lien statute to abolish the remedy of equitable lien without an explicit statement to that effect. Id. at 501. In the case at bar there is no express declaration in the statute of the position urged by Petitioner.

In its opinion, the District Court of Appeal interpreted the legislative intent from the language and form of the original act, Chapter 74-130, Laws of Florida, as argued by Respondent. The Appellate Court did not address the following argument on the legislative intent which was presented by the Respondent.

The people of Florida in adopting the Constitution of 1968 clearly expressed their intention in Article VIII, Section 2 to provide a broad grant of home rule power to the cities of this

state. Subsection (b) of that section, entitled "POWERS," provides:

> "Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided law. Each municipal legislative body shall be elective."

This home rule constitutional provision has been implemented by the legislature and is incorporated as Section **166.021** of the Florida Statutes, as part of the Municipal Home Rule Powers Act. That section and the subsequent sections of Part I grant to local government a very broad grant of powers which can only be limited by either the restrictions contained in the act itself or by the express restrictions contained in the constitution, general law or county charters under certain circumstances.

This legislative limitation is clear and unambiguous. It demonstrates that except to provide uniform recall procedures statewide for municipalities and charter counties, Chapter **74-130** was not intended as a preemption of the authority of local governments and their citizens to determine whether they wanted to provide for municipal recall of members of the governing bodies.

In determining the legislative intent it is important to look at the statutes governing municipalities and elections as a whole. Chapter **100** of the Florida Statutes regulates the procedures for general, primary, special, bond, and referendum elections. Chapter **166** of the Florida Statute addresses the

powers of municipalities. For example, the power of initiative is provided in Section 166.031 Florida Statutes. The powers and limitations on the broad powers of municipalities granted by the state constitution Article VIII Sec. 2(b) are contained in Section 166.021 Florida Statute. If in fact the legislature intended to mandate the remedy of recall for all municipalities such a mandate would logically appear in Chapter 166.

As a requirement for recall in all municipalities would constitute a limitation on the municipalities power to legislate on any subject matter upon which the state legislature may act, such a requirement cannot be found through inference or assumption.

The intent as stated by the legislature is to make the procedures uniform. No specific statement is made as to the availability of the remedy itself. It therefore is reasonable to apply the statute only to those cities and charter counties choosing to have recall.

The key language which has been ignored in Petitioner's argument is that contained in subsection (4) of Section 166.021 of the Florida Statutes. This subsection recognizes the authority granted by the legislature to each municipality to secure the broad exercise of home rule powers granted by the constitution. The provisions of the Home Rule Powers Act should be construed to secure for municipalities the broad exercise of powers which formerly were vested only in the legislature unless such powers are expressly prohibited by general law.

Regardless of the arguments which were made by Petitioner, she is really arguing for a restriction of those home rule powers by judicial construction of Section 100.361. Such a restriction can only be accomplished by express statutory language, however, which is not present here.

The First District Court of Appeals recently discussed the meaning of express preemption in Florida League of Cities, Inc. v. Department of Insurance and Treasurer, 540 So.2d 850 (1st DCA, 1989). In discussing the applicability of Chapter 175 retirement provisions to local law retirement plans, the Court states:

> "'Express preemption requires a specific statement; the preemption cannot be made by implication nor by inference.' (citations omitted)... 'An "express" reference is one which is distinctly stated and not left to inference.'" Id. at 556.

That Court ruled that the statutory provision in Chapter 175 which states: "This chapter hereby establishes minimum standards for the operation and funding of municipal firefighters pension trust fund systems and plans" was insufficiently explicit to mandate that the chapter be applied to local law retirement plans. Id. at 557.

Likewise, the recall statute does not contain a specific or explicit statement that the statute shall apply to all municipalities whether or not they have chosen to have recall elections. Without such an express mandate or preemption, municipalities have the power to choose not to have recall elections. The Town of Pembroke Park has so chosen by failing to have recall provisions in its charter.

Volunteer State Life Ins. Co. v. Larson, 2 So.2d 386 (Fla. 1941) is a taxation statute case cited by Petitioner. In interpreting the statute involved there, this Court stated "... it can be presumed that the legislature placed therein and omitted therefrom items and things intended to be taxed or omitted from taxation." Id. at 387. Similarly, the legislature in this case specifically stated which cities and counties were governed by the recall statute. It should be presumed therefore, that it omitted those cities and counties to which the statute does not apply.

By virtue of the statutory construction rule that the mention of one thing implies the exclusion of another, the statute does not apply to cities without recall provision. "...[W]here a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned." Thayer v. State, 335 So.2d 815, 817 (Fla.1976). As this statute specifically describes the cities and counties to which it applies, those cities and counties not fitting that description must be excluded from its operation.

The Petitioner argues that subsection (9) was included to amplify and expand on subsection (8) as without subsection (9) the effect of the statute on local ordinances is unclear. This construction is not logical, however, in that subsection (8) clearly and specifically repeals conflicting local procedures. Subsection (8) states "Therefore, all municipal charter and special law provisions which are contrary to the provisions of

this act are hereby repealed to the extent of this conflict." Subsection (8) therefore clearly provides for uniformity of recall procedures, without necessity for the language in subsection **(9)**.

As a statute should be construed to give effect to each and all of its provisions, subsection (9) must be interpreted to mean more than a restatement of subsection **(8)**. Cliento v. State, **377** So.2d **663** (Fla. **1979)** (statute describing when a doctor may prescribe controlled substances, to be given effect must mean prescriptions given outside the parameters of the statute would be penalized).

The Petitioner argues that the first sentence in section one shows the intent that all cities and counties should have recall. That sentence reads "Any member of the governing body of a municipality or charter county, hereinafter referred to in this section as 'municipality,' may be removed from office by the electors of the municipality." Section 100.361(1) Fla. Stat. **(1987)** This sentence however appears in a subsection entitled "Recall Petition", which goes on to describe in great detail the procedures to be used in initiating a recall. It therefore relates only to the procedure aspect of the statute and not to the intent of the legislature or the applicability of the statute. The statute contains specific subsections for both intent and applicability (**(8)** and **(9))** as discussed above. The first sentence of the statute presupposes that the statute applies pursuant to subsection **(9)**.

C. THE ELECTION DATE SET BY THE CHIEF JUDGE IS OUTSIDE THE WINDOW PERIOD PROVIDED IN THE RECALL STATUTE AND IS THEREFORE UNAUTHORIZED.

In the event this Court disagrees with the District Court of Appeals as to the certified question, there are alternate grounds for the reversal of the trial court order which were argued in the Fourth District. The first of these alternate arguments is that the election date set by the Chief Judge is outside the window period provided by Section 100.361(2) Fla. Stat. and is therefore unauthorized.

The recall statute provides a specific time frame for any recall election to be set. That is between 30 and 60 days from a recall subject's failure to resign in the designated period for resignation. In this case the count begins **5** days after January **27, 1989,** the date notice was give to Mayor Koretsky that the supervisor of elections had certified the signatures on the second round of recall petitions. **(A.221)** The 60th day was April **2, 1989,** a Sunday, and therefore April **3, 1989.** The April **25, 1989** election date is obviously outside the window period, and therefore unauthorized.

The Petitioner, Sarah Phelps suggested below that the filing of the notice of appeal tolls the window period for the period of time in which the appellate court has jurisdiction by virtue of the automatic stay. A rule of this nature, however, cannot be applied to a meritorious appellant in a recall situation. If it were applied, a recall subject could thwart all attempts to set an election by filing a notice of appeal on the thirtieth day following the order setting election. In most instances,

regardless of the outcome of the appeal, the window period remaining after an appellate court mandate would be insufficient to fulfill the statutory requirements of notice to the public in the fifth and third week before the election, making a recall election impossible. Section 100.242 Fla. Stat. (1987). This certainly would have been the result in this case. Perhaps the automatic stay should be applied to toll the window period if the recall subject is unsuccessful in his appeal, as his right to file an appeal should not in and of itself undermine the recall election process. Mayor Koretsky, however has already been successful in his appeal of the first order of February 13, 1989, setting the election for March 14, 1989 as that order has been amended to require notice to the public and a qualifying period for successor candidates. (A.99) Therefore a tolling rule cannot apply to him.

As elections are a political matter, it is important to consider that the status quo in terms of public sentiment cannot be judicially mandated. An officeholder who is successful in his appeal should not be denied the political benefits to him resulting from the 60 day limitation on elections solely by virtue of filing a meritorious appeal. In such a case, the officeholder would be forced to choose between having an early election or pursuing an appeal to ensure the election procedure is fair and pursuant to statute. Meritorious litigants should not be forced to make this choice.

In addition, the appellate rules clearly provide that the trial court can, in its discretion, vacate the automatic stay

applying in these situations. Fla.R.App.P. 9.310(b)(2). Therefore even without a "tolling rule", recall elections can be held during the window period, despite a pending appeal, if the trial court and/or appellate court decide the circumstances of a given case so require. In this case an ore tenus motion was made to the trial court to vacate the automatic stay, which was not granted. (A.142, 184-186, 192)

Petitioner argued below that the initial appeal tolled the election date window period as an appeal would toll a statute of limitations period. The window period is not a statute of limitations however. It is a procedural statute, and does not affect the availability of recall as a remedy. If the election cannot be held within the window period, as it cannot in this case, there is no prohibition against initiating a subsequent recall petition while the appeal is pending. The Petitioner's remedy is not barred by the appeal and automatic stay.

Assuming, arguendo, that the notice of appeal does toll the window period, the date selected by the Chief Judge, April 25, 1989 is still outside the applicable time period. To make the calculation, the days between the end of the five day resignation period and the first notice of appeal are elapsed days, as follows:

Notice to mayor of requisite signatures	-	January 27, 1989
Last Day of five day resignation period	-	February 1, 1989
Date of first notice of appeal	-	February 17, 1989
Elapsed Days	-	15

In addition, the two periods in which the Fourth Distric Court of Appeals relinquished jurisdiction to the trial court for

further proceedings, must count as elapsed days in the window period, as follows:

First Relinquishment Order for Motion to Correct Scrivener's Error	-	March 2, **1989**
Order on Motion to Correct Scrivener's Error	-	March 6, **1989**
Elapsed days	-	5
Second Relinquishment Order to Reset Election Date	-	March **14, 1989**
Order Resetting Election Date	-	March **17, 1989**
Elapsed days	-	4

Accordingly, when the last trial court order was entered setting the election date, 24 days had elapsed in the window period, leaving **36** days in which the election must be advertised and held. April 25, **1989,** the final election date was **39** days from the March **17, 1989** order, and thus outside the statutory period.

Since the March **17, 1989** order 2 additional window period days elapsed before the Notice of Appeal of that order was filed on March 20, **1989**. Accordingly, if an election date were reset, even according to Petitioner's argument only **34** days remain in the window period to advertise and hold the election.

In calculating the number of days in which the statutory window period was tolled by virtue of the automatic stay, Petitioner Phelps includes the 5 day relinquishment period in which she prosecuted her motion to correct an alleged scrivener's error in the trial court. This time period should have been considered as days elapsed, however. Counting both relinquishment periods as days elapsed, the April 25, **1989** election date is outside the window period even if the appeal tolled the 60 day count.

During the relinquishment period to correct a scrivener's error, the automatic stay did not operate to preserve the status quo as to the Mayor, as the order setting election date was substantially altered. The February 13, **1989** order which directed the ballot question "Shall Barney Koretsky be removed from the office of Mayor of Pembroke Park by recall?", was changed on March 6, **1989** to "Shall Barney Koretsky be removed from the governing body of Pembroke Park by recall?" (A.57) This change created a completely different issue for the electorate and thus materially changed the position of Mayor Koretsky. Accordingly, the argument that a stay operates to preserve the status quo and therefore tolls the window period for election must fail as to this relinquishment time period. If the status quo is not preserved, the window period cannot be tolled. As both relinquishment periods resulted in substantial changes in position as to the issue in the election and then the date and procedures, both relinquishment periods must be counted as elapsed time. Accordingly, April 25, **1989** is outside the window period.

D. THE CHIEF JUDGE SHOULD HAVE RULED ON THE ISSUES PRESENTED IN THE ANSWER AND COUNTERCLAIM AND CROSSCLAIM FILED BY MAYOR KORETSKY BEFORE SETTING AN ELECTION DATE.

Since the District Court of Appeal opinion addressed only the issue of whether or not the uniform state recall procedure applied to a municipality which had no recall provision in its charter, the very serious question of whether the trial judge should have considered the challenge of the Respondent, Mayor

Roretsky to this second recall attempt was never ruled on by the appellate court.

The trial judge ruled that she could only perform the ministerial action required by Section **100.361** Florida Statutes to set the election date. She did, however, accept additional responsibility when she entered the Order on Motion for Statutory Compliance which was appealed by the amended Notice of Appeal in this case **(A.99).** At the hearing held on March **16, 1989** the record indicates that there was tacit recognition by the Petitioner's counsel and acceptance by the Acting Chief Judge that her duties in this case were more than merely a ministerial act of setting an election date within the "window period" and that the order must fully comply not only with all of the requirements of Section **100.361** but also with Section **100.342** requiring publication **of** notice,of the election **(A.232-236).** The order also provided for procedures for filling any vacancy which might be created in accordance with Section **100.361(4)** of the recall statute.

Subsequent to that hearing and while this case was pending on appeal, the Second District Court of Appeal decided the case of Jividen v. McDonald, **541** So.2d **1276** (Fla.App. 2nd DCA **1989)** which contains dicta which appears to support the position taken by Petitioner and the trial judge in these proceedings. The court stated in that opinion:

> "A review of the procedure to be utilized under the municipal recall statute reflects that the legislature did not direct the city clerk, the supervisor of elections, or the chief judge of the circuit to determine the

legal sufficiency of these petitions." (emphasis supplied).

The Petitioner agrees with the holding of the court in the Jividen case that the city clerk has no authority under the Florida recall statute to make a determination of the legal sufficiency of the charges upon which the recall is based. However, the court in the quoted paragraph seems to imply that the chief judge also lacks the authority to make that determination if the issue is raised, as it was in the instant case, by way of a counterclaim and affirmative defenses, to test the legal sufficiency of the petitions **(A.69)**.

The court in Jividen recognized that a city official sought to be recalled "may be required to file a court action to test the legal sufficiency of the recall petition", as was done by Mayor Koretsky in the instant case. Id. at **1279** Subsequently that court action was voluntarily dismissed by the Mayor in order to have a final order from which to appeal the acting chief judge. When jurisdiction was relinquished by the court of appeals for the purpose of considering the Motion for Statutory Compliance, the Mayor sought to raise those legal issues of the sufficiency of the recall petitions in the instant case and the trial court refused to entertain them. She stated in her March **17, 1989** order:

> **"7.** Upon execution of this Order, this Court recognizes the limited role of the Chief Judge of the Seventeenth Judicial Circuit, in accordance with the State of Florida Election Code, to set dates for and other related activities associated with a recall election and no finding or conclusion as to the legitimacy of

> the Petition, the efficacy of the recall or other substantive items has been ruled upon by the Order." (A.101)

There is nothing in the recall statute to suggest that the Chief Judge should attempt to bifurcate the issues into two separate actions. If an elected official challenges the attempt to recall him based upon the alleged deficiencies in the Recall Petition, as was done by the Mayor in this case, that case may be properly assigned to another division of the court or entertained by the Chief Judge. However, nothing in either the statute or the Rules of Civil Procedure suggest that where, as in the instant case, the objections to the recall procedure are not pending before the court, it is appropriate for the Chief Judge to refuse to hear those issues relating to the legitimacy of both the substance and procedure followed in the recall.

In addition to the questions raised earlier in this brief regarding the applicability of the recall provision contained in Section 100.361 to a municipality whose charter does not provide for recall, and the effect of the window period, the Mayor raised in his Counter-Petition and Cross-Claim a challenge to the number of valid signatures to the first petition. The Mayor also raised the question of whether the allegations that he had violated Section 286.011 of the Florida Statutes by participating in a meeting which had not been properly noticed, and which allegation constituted an infraction rather than a crime, was legally sufficient to sustain a recall petition under S. 100.361. None of these questions have been addressed by any court as a result

of the refusal of the Acting Chief Judge under Section 7 of the order appealed to entertain them.

The case law is clear in this state that a public official whose recall is sought has a right to challenge the legal sufficiency of that recall both as to substance and procedure. In the instant case, Mayor Koretsky has been denied that right by the order of the Chief Judge which was the subject of the appeal. It is clear under all of the cases which interpret the uniform recall law that while all the electors must make the decision on the ultimate truth or falsity of those charges, it is the responsibility of the court to determine their legal and procedural sufficiency. Mayor Koretsky is yet to have his day in court on that question.

Only by requiring the trial judge to hear these issues can those rights of the Mayor be protected in this case. The Mayor should not have to submit to a recall election if either the procedure to effect such a recall or the substantive basis for such a recall was not legally sufficient.

There is no support for the position taken by Petitioner and the trial court that the legal sufficiency of the recall petition should not be tested before the acting chief judge in these proceedings. The acting chief judge can not be permitted to "open the door of the court just a crack" to allow the Petitioner in to obtain an order setting the election and then to bar the Mayor from entering the court to test the sufficiency of the recall petitions. It would be most appropriate for this court to address this issue in reviewing this case, as it certainly is

another question of great public importance to local government officials as well as the courts of this state.

E. THE MARCH 6, 1989 ORDER DID MORE THAN CHANGE A SCRIVENER'S ERROR AND THEREFORE WAS ENTERED IN EXCESS OF THE CHIEF JUDGE'S JURISDICTION PURSUANT TO THE APPELLATE COURTS RELINQUISHMENT.

The original trial court order setting election date recited' the following ballot question:

> "Shall Barney Koretsky be removed from the office of Mayor of Pembroke Park by recall?" (A.3)

Subsequently, Petitioner Phelp's filed a Motion to Correct a Scrivener's error on the basis that the ballot question should have referred to removing Barney Koretsky as a member of the governing body of Pembroke Park. (A.7)

The motion to correct alleged scrivener's error should have been denied by the trial court. The mistake alleged by petitioner was clearly a mistake in substance and not an accidental slip or omission.

At the time the initial order was prepared it was intended that it should read as it did. The order did not differ from what was requested in the petition. (A.l) The specific language of the ballot question was purposely written to read as it did. Some time later Petitioner realized a mistake had been made in using that language, but not all mistakes are scrivener's mistakes. As the recall of Mayor Koretsky from his position of Mayor is materially different from his recall from the governing body, the mistake made was one of substance, and cannot be corrected as a clerical mistake. Wilder v. Wilder, 251 So.2d, 311 (Fla. 4DCA) 1971 (Final Judgment which included life

insurance which was different from that orally announced in court could not be corrected as a clerical error) "When a trial court's order under the rule goes beyond the correction of a technical error and actually modifies the substance of a record the court has acted in excess of the power conferred upon it by the rule." McKibbin V. Fujarik, 385 So.2d 724, 725 (Fla. 4DCA 1980). As Judge Burnstein materially changed the substance of the record in the March 6, 1989 order, she exceeded her jurisdiction to correct a scrivener's error as granted by the appellate court.

Petitioner argued below that the March 6, 1989 order amending the February 13, 1989 order is sustainable under Florida Rules of Civil Procedure 1.540(b) as a correction of a mistake resulting from inadvertence. The lower court did not have jurisdiction to consider a motion under that rule, however as the relinquishment was solely to consider correcting a scrivener's error. A clerical mistake can be corrected pursuant to Florida Rules of Civil Procedure 1.540(a), which states:

> a) CLERICAL MISTAKES. Clerical mistakes in judgments, decrees or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal such mistakes may be so corrected before the record on appeal is docketed in the appellate court and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

As stated in McKibbin, "[T]he issue is whether Rule 1.540(a)

can be employed to correct substantial errors of counsel. We hold that it cannot "Id. at 725.

The scrivener's error issue is not moot by virtue of the second relinquishment of jurisdiction. That relinquishment was for the purpose of making those orders as necessary to carry out the recall election within the time frame specified by statute. Therefore the second relinquishment related to the date of the election and not the language of the ballot question. The change from "Mayor" to "member of the governing body" was solely a result of the first relinquishment order.

Accordingly, the March 6, 1989 order should be reversed.

CONCLUSION

Respondent respectfully requests that this Honorable Court affirm the opinion of the Fourth District Court of Appeals and answer the certified question in the negative.

In the event this Court answers the certified question in the affirmative, Respondent respectfully requests that this Court consider the alternate grounds for reversal of the trial court orders appealed to the Fourth District. Respondent requests that the trial court order of March 17, 1989 be reversed, on the basis that the election date is outside the window period.

Alternatively, Respondent requests that the March 17, 1989 order be reversed and the cause remanded for consideration by the trial court of the Respondents answer, counterclaim, and cross-claim. Additionally, Respondent requests that the March 6, 1989 order be reversed on the basis that it was entered in excess of the Court's jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular mail this 28 day of July, 1989 to: STUART MICHELSON, ESQUIRE, 1125 Northeast 125th Street, Suite 250, North Miami, Florida 33161; HARRY HIPLER, ESQUIRE, 215 North Federal Highway, Post Office Box 216, Dania, Florida 33004; and to SAMUEL S. GOREN, ESQUIRE, Josias & Goren, P.A., 3099 East Commercial Boulevard, Suite 200, Fort Lauderdale, Florida.

JOSEPH H. WEIL, ESQUIRE
Co-Counsel for Barney Koretsky
500 Southwest 109th Avenue
Sweetwater, Florida 33174
Telephone: (305) 895-6366

By: _____
JOSEPH H. WEIL, ESQUIRE
Florida Bar Number: 085675

MILLER, SQUIRE & RAFFERTY, CHARTERED
Attorneys for Barney Koretsky
500 Northeast Third Avenue
Fort Lauderdale, Florida 33301
Telephone: (305) 764-3211

By: _____
CATHERINE RAFFERTY, ESQUIRE
Florida Bar Number: 348872