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IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,189

ROBIN C. KRIVANEK, as Hillsborough County Supervisor of Elections

Petitioner

vs.

TAKE BACK TAMPA POLITICAL COMMITTEE
and
RICHARD M. CLEWIS, III

Respondents.

ON REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

# BRIEF ON JURISDICTION OF RESPONDENTS

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## TABLE OF CONTENTS

## TABLE OF CITATIONS

## PRELIMINARY STATEMENT

The Supervisor's Statement of the Case and Facts should be disregarded or stricken because it is built almost entirely upon statements outside the record. The record in this case is the Decision of the Second District Court of Appeal (hereinafter "Decision") attached as an appendix to Petitioner's Brief. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). (The only relevant facts are those contained "within the four corners of the majority decision" appealed from.) Reaves, which applied to a jurisdictional brief on alleged decisional conflict, should apply in the present case because the Petitioner argued decisional conflict on pages 7 and 8 of her Jurisdictional Brief. Moreover, Reaves should apply because appeals alleging decisional conflict and appeals alleging an affect on a class of constitutional officers both must "expressly" appear from the decision appealed from. Rule 9.030(a)(2) (A)(ii) and (iii), Fla. R. App. P.; Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980).

The Supervisor's Statement of Facts also must be disregarded or stricken because it often directly conflicts with the record. For example, on page two of her Brief the Petitioner stated "after the 30-day period the Supervisor purged the names of those electors who failed to return said postcards . . .". (emphasis added). This conflicts with the Decision where the court stated ". . . the Supervisor testified at her deposition that these records had not been removed from her computer files at the time the signatures

were being verified at her office." (Decision at P. 9, emphasis added.)

**STATEMENT OF FACTS**

This case involves the interpretation of Section 98.081 Fla. Stats. (1991) as applied to Section 10.07 of the Tampa City Charter. (Decision P. 2, 7, 11-12). The Charter provides that a petition for a referendum must be signed by electors of the city equal in number to not less than 10 percent of the electors of the city qualified to vote at the last general municipal election. (Decision at P. 7). The issue was whether electors placed on a temporarily withdrawn list pursuant to Section 98.081(1), Fla. Stats., were eligible to sign a referendum petition under Section 10.07 of the Tampa City Charter.

"The Respondents/Appellees, The Take Back Tampa Political Committee and its chairman, Richard M. Clewis, III, [TBT] initiated a petition drive which sought to put to a city-wide vote the question of repealing city ordinance 91-88. Section 10.07 of the Tampa City Charter authorizes such an election if a referendum petition is certified as signed by a requisite number of qualified electors, i.e., registered voters who live in the city. During the petition drive, the Supervisor withdrew from her permanent registration books the names of registered voters who had not voted in the last two years and who had not returned a response card to her indicating they wished to remain voters. Section 98.081(1) of the Election Code required her to accomplish this procedure at some time during each odd-numbered year. At this point, the names are

'temporarily withdrawn' but not yet 'removed' under the circumstances required by section 98.081(2). When the petition was submitted to the Supervisor, she refused to count the signatures of those registered voters she had temporarily withdrawn. Without those signatures, the petition did not have the requisite number for certification by the supervisor in order to place the question before the entire city electorate. TBT sought and was granted a writ of mandamus to have the supervisor count the signatures she had not counted previously if they were otherwise valid. The Supervisor complied with the writ of mandamus which resulted in a determination that the petition contained a sufficient number of valid signatures to place the issue on the ballot. She also appealed the issuance of the writ arguing that the circuit court's construction of the statute -- which compelled her to count as registered voters persons not on her permanent registration books -- was contrary to legislative intent." (Decision P. 2-3).

Based upon the analysis set forth in the appellate court's opinion, the court concluded that a "qualified elector remains 'qualified' for three years before the qualification is definitively lost . . . city electors who were placed on the Supervisor's temporarily withdrawn list retain their legal status as qualified electors for purposes of signing a referendum petition and were thus eligible to have their signatures counted by the Supervisor." (Decision at P. 12).

## SUMMARY OF THE ARGUMENT

The Decision appealed from directly affects electors on the temporarily withdrawn list who signed a petition pursuant to Section 10.07 of the Tampa City Charter. It, therefore, cannot "exclusively" affect supervisors of elections. To the extent the Decision affects supervisors of elections, it does so only indirectly and incidentally because supervisors administer voter registration records. Decisions, like the one at issue here, which merely indirectly and non-exclusively affect the performance of a constitutional or state officer, do not provide a basis for discretionary jurisdiction. Moreover, this Decision does not "expressly" affect supervisors of elections as required by the 1980 Amendment to Article V, Section 3(b)3 of the Florida Constitution.

## ARGUMENT

The discretionary jurisdiction of this court under Article V, Section 3(b)3 of the Florida Constitution cannot be invoked unless the Decision appealed from "directly, and in some way, exclusively affects the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers." Spradley v. State, 293 So.2d 697, 701 (Fla. 1974) (emphasis in original). The Decision appealed from here does not have the direct and exclusive affect necessary to this court's jurisdiction. The Decision involves the substantive law regarding the legal status of "electors" and has a direct and primary affect on "electors" temporarily withdrawn from voter registration rolls pursuant to Section 98.081(1) Fla. Stats. To the extent the

Decision affects supervisors of elections, it does so non-exclusively and only indirectly and incidentally as administrators of voter registration records.

The facts in this case are analogous to those in Spradley, where this Court found that it did not have certiorari jurisdiction. The trial court in Spradley denied the Petitioner's motion to dismiss an indictment, which had been based upon the allegation that the assistant state attorney who signed the indictment had not properly recorded his oath of office. The Petitioner argued that the denial of his motion to dismiss, and the appellate court's affirmance, affected "the class of assistant state attorneys". Id. The decision affected this class, he argued, because it affected the performance of the duties of assistant state attorneys. This court held that the decision appealed from did not affect a class of state attorneys so as to invoke the Court's jurisdiction. The decision only affected "the substantive and procedural law regarding the sufficiency of indictments in general. . .". Id.[1]

Petitioner in the present case likewise argues that the Decision will affect all supervisors of elections because it affects the performance of the duties of all such supervisors.

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[1] In 1980, six years after this Court decided Spradley, the Florida Constitution and Rule 9.030(a)(2)(A)(iii), Fla. R. App. P. were amended to add "the restrictive term 'expressly'" to the requirements for this type of discretionary jurisdiction. This further narrowed the basis for invoking this Court's discretionary jurisdiction.

That is not sufficient for the exercise of jurisdiction here because there is no direct and exclusive affect on supervisors. The primary, direct affect here is on registered voters (electors) whose names were put on the temporarily withdrawn list. Supervisors are affected only indirectly. If every appellate decision interpreting a statute which affected the performance of a state or constitutional officer created a basis for discretionary jurisdiction, then the purpose of creating District Courts of Appeal would be defeated. Spradley at 701. District Courts of Appeal are intended to be courts of final appellate jurisdiction except in limited specific circumstances. Id. They are not, as the Supervisor suggests, merely an advisory stop on the way to the Supreme Court in cases involving statutory interpretation.

The Petitioner also apparently seeks jurisdiction under a poorly disguised argument that there is a conflict in the Districts to be resolved here. (See Petitioner's Brief on Jurisdiction at p. 7 and 8). There is no basis for conflict jurisdiction here. First, the alleged conflict between Advisory Opinion 87-16 ("Adv. Op. 87-16") and the Decision is irrelevant. Advisory Opinions are just that. They advise and nothing more. They are guidelines which are binding only on persons to whom they are directed. Section 106.23(2), Fla. Stats. (1991). (Advisory "opinions, until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought.") Adv. Op. 87-16 was not directed to the Petitioner in this

case and it does not pertain to the dispute from which this case arose.

Second, the Decision distinguished Adv. Op. 87-16, so that it does not apply to the facts of this case. On page 9 of the Decision, the Second District Court of Appeals explained that the Supervisor had not purged the signature card records from her computer and, therefore, signatures could be verified. Adv. Op. 87-16 assumed that the relevant signatures had been removed from the records and, therefore, could not be verified.

Finally, the Decision of the Court of Appeals is final and is the law of this State. Stanfill v. State, 384 So.2d 141, 143 (Fla. 1980). It is not merely advisory. All supervisors in the state must follow this Decision to the extent that it is relevant to their facts.[2] There is no basis here for conflict jurisdiction.

**CONCLUSION**

The Decision directly affects "electors." The Decision does not directly and exclusively affect supervisors of elections. The request for jurisdiction must be denied.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. Mail this 29 day of

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[2] The footnote on page 7 of the Supervisor's Brief claiming that other Supervisors have inquired about this case is outside the record and improper. That footnote must be stricken from the Brief. In any event, all Supervisors are bound to follow the law as set forth in the Decision to the extent it applies to their facts.

September, 1992, to John Dingfelder, Esq., 725 E. Kennedy Blvd., Tampa, FL 33602.

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