BEFORE THE SUPREME COURT
OF THE STATE OF FLORIDA

SUPREME COURT CASE NO. 94,751
District Court Case No. 98-2975
Lower Tribunal Case No. 98-31977-CICI

PHYLLIS T. GARVIN

Petitioner,

v.

JOANNE JEROME, Chairman of the Municipal Recall Committee of Daytona Beach Shores; and **DEANIE LOWE**, Supervisor of Elections, County of Volusia,

Respondents.

RESPONDENT JEROME'S AMENDED ANSWER BRIEF RE: CONFLICT JURISDICTION

Petition for review of the Fifth District Court of Appeals
Order of December 18, 1998

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TABLE OF CONTENTS

This is to certify that the font used for this brief is Courier New Font (12 point).

SIGNED: Kim Flaherty
KIM FLAHERTY
Legal Assistant to
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DATED: 3/26/99

TABLE OF CITATIONS

SUMMARY OF ARGUMENT

Because the essential facts differ so greatly, the December 18, 1998 decision of the Fifth District is not in conflict with that of Davis v. Friend, 507 So.2d 796 (Fla. 4th DCA 1987). In this case, the issue presented on the facts adduced was whether Section 100.361(1)(b), Florida Statutes, should be construed to require more than one of several recall charges to be legally sufficient. The Fifth District concluded no such requirement could be found in the statute. Davis, however, was apparently not presented with this statutory construction question. Based on the evidence that a substantial number of recall petition signers did so on the basis of invalid charges, Davis found the petition to be tainted beyond repair. No such question was presented by the Petitioner here.

Further, the Davis court noted it disagreed with Wolfson v. Work, 326 So.2d 90 (Fla. 2d DCA 1976), "to the extent it holds that recall proceedings may not be enjoined even though they are predicated on a petition substantially based on invalid grounds." Davis, 797. However, Wolfson only held that no error had been committed by the lower court that required enjoining the election. Id, 91.

Thus, no conflict of fact or law exists.

ARGUMENT

No direct conflict exists where the same principles are

applied to reach different results on different facts. Wilson v. Southern Bell Telephone And Telegraph Co., 327 So.2d 220 (Fla. 1976). It is a conflict of decisions, not a conflict of opinions or reasons that supplies jurisdiction for review by certiorari. Gibson v. Maloney, 231 So.2d 823, 824 (Fla. 1970). This Court's conflict jurisdiction is constitutionally limited to cases where there is a real and embarrassing conflict of opinion and authority between decisions and cases involving the settlement of principles important to the public. Ansin v. Thurston, 101 So.2d 808, 811 (Fla. 1958), cited in Hastings v. Osius, 104 So.2d 21, 22 (Fla. 1958).

In Davis, the question presented was whether a recall election should be enjoined where a substantial number of signers did so on the basis of four of five charges that were legally insufficient. In Davis, the only implied reference to the statute was to Section 100.361(1)(a) (concerning the substantial number of signatures required). In this case and in Wolfson, it was Section 100.361(1)(b) that was construed (grounds for removal). In Wolfson, the issue was whether Section 100.361(1)(b) required all charges in a petition to be legally sufficient. The analysis for this question differs substantially from that undertaken in Davis.

On page 4-6 of its order, the Fifth District panel recognized that two other districts have considered the broad question of whether the statute requires more than one valid charge "and reach opposing views." However, the panel did not consider the question presented in Davis, except as to its policy and underlying

reasoning.

The Garvin panel then analyzed the reasoning of Wolfson that there is no legal requirement that all grounds of a recall petition be legally sufficient, and that of Davis that it would be impossible to determine whether voters that signed did so in reliance on invalid rather than valid charges. No such argument concerning reliance on invalid charges was presented by Mrs. Garvin below. The Garvin panel noted the "impossible task" of determining what was subjectively in the minds of the signers.

The panel also rejected a consideration of whether the stricken charges were "more serious" than the valid charge, noting that appellate courts do not have sufficient guidance in the law to make that determination. In aligning itself with Wolfson on the statutory construction issue, the Fifth District rejected the reasoning of Davis as too intrusive in the political process, as a matter of judicial policy. (A-5,6). Thus, this case falls squarely within the Gibson rule.

In the trial court or on appeal, Mrs. Garvin did not raise any issues as to the subjective intent of the recall petition signers as to the invalid charges. She simply asserted that all her recall charges are legally insufficient, not that the voters were improperly influenced by the invalid among them. The facts of her case thus differ substantially from the facts of Davis that were essential to that decision. (A-4.)

To distinguish Wolfson from her case, Mrs. Garvin asserted on appeal that in the Wolfson case the city charter had express

prohibitions against the giving of orders to subordinates of the City Manager. Because the Garvin recall committee used the phrase "direct work instructions...in violation of "Section 3.06..." instead of tracking the language of the Charter, Mrs. Garvin claimed she escaped the holding of Wolfson. (A-4.) The problem with this argument is that the Wolfson court was never presented with the question of whether a recall charge must exactly track the violated Charter provision. No conflict exists on this ground.

Her other attempt at distinction was to note that in Wolfson, one charge was found valid and the remainder were not considered. (A-4) However, the lower court in Wolfson denied a motion to strike the other four charges, which was held not to be error. The four invalid charges in Wolfson were indeed considered. Thus, this case falls foursquare into the ambit of the Wolfson facts.

Here, the Petitioner failed to put at issue her assertion that the Shores' voters were induced into signing a substantially insufficient recall petition, as apparently was the case in Davis. (A-4.) Nor did she make any argument that the stricken charges were "more serious" and therefore outweighed the legally sufficient charge.

CONCLUSION

Because the facts and reasoning of this case differ greatly from that found to be dispositive in Davis, the decisions do not conflict and there is thus no basis for asserting this Court's conflict jurisdiction. Finally, the Davis court did not consider

the same question of statutory construction as presented here and in Wolfson. There may be an issue, but it is not properly framed in this case to support a claim of conflict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail the 26th day of March, 1999 to Phyllis Garvin, pro se, 2555 South Atlantic Avenue, #406, Daytona Beach Shores, FL 32118; and to Frank B. Gummey, III, Esquire, Assistant County Attorney, County of Volusia, 123 West Indiana Avenue, DeLand, Florida 32720.

MARY D. HANSEN, ESQUIRE