IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2096

THIRD DISTRICT CASE NO. 3D00-2746

ARI MILLER,

Petitioner,

vs.

GINA MENDEZ, KATHERINE HARRIS, As Secretary of State, et al.,

Respondents.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF RESPONDENT KATHERINE HARRIS

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INTRODUCTION

Petitioner, ARI MILLER, was the Plaintiff in the trial court and the Appellant in the Third District Court of Appeals. Respondents GINA MENDEZ, KATHERINE HARRIS, as Secretary of State and DAVID LEAHY, as Supervisor of Elections of Miami-Dade County were the Defendants in the Circuit Court and Appellees in the Third District. The parties will be referred to, in this brief, as they stand before this Court. The symbol "R" will be used, in this brief, to refer to the Record on Appeal before the Third District Court of Appeals.

STATEMENT OF THE CASE AND FACTS

The facts and situation relevant to this action were properly set forth in the decision of the Third District, as follows:

> PER CURIAM.
>
> The plaintiff below, Ari Miller, appeals from an adverse final judgment. We affirm.
>
> Because the trial court succinctly recites the facts of this case and is correct in its application of the relevant law, we adopt the trial court's order in its entirety as our own.
>
> FINAL JUDGMENT IN FAVOR OF DEFENDANTS
>
> THIS CAUSE came before this Court on September 22, 2000, on Plaintiff's Complaint seeking an injunction and a declaratory statement against Defendant Mendez to remove Defendant MENDEZ' name from the November 7, 2000 ballot on the grounds that she had not

established her residency in Miami-Dade County at the time she signed her Oath of Candidate. The Court having reviewed the pleadings including the Stipulated Facts filed by the parties, having considered the arguments of counsel, having reviewed the court file, and having been otherwise fully advised in the premises, the Court finds as follows:

1. That this Court has subject matter jurisdiction. See State ex. rel. Shevin v. Stone, 279 So.2d 17 (Fla.1972); Op. Att'y Gen. Fla. 76-130 (1976).

2. That Article V, Section 8, of the Florida Constitution provides in pertinent part -

No person shall be eligible for office of justice or judge of any court unless the person is an elector of the state and resides in the territorial jurisdiction of the court.... No person is eligible for the office of circuit judge unless the person is, and has been for the preceding five years, a member of the bar of Florida....

3. That Article V, Section 8, of the Florida Constitution does not expressly specify when a candidate for judicial office must establish his or her residency requirements, i.e., at the time the candidate qualifies for election or before assuming office.

4. That the Florida Supreme Court has ruled that the eligibility requirements set forth in the Florida Constitution, referred "to eligibility at the time of assuming office and not at the time of qualification or election to office." In re Advisory Opinion to the Governor, 192 So.2d 757, 759 (Fla.1966).

5. That the Florida Supreme Court recently had the opportunity to address the issue of eligibility requirements and concluded that, "[T]he eligibility requirements 'refer to eligibility at the time of assuming office not at the time of qualification or election to office.' " In re Advisory Opinion to the Governor--Terms of County Court Judges, 750 So.2d 610, 613 (Fla.1999) quoting In re Advisory Opinion to the

Governor, 192 So.2d 757, 759 (Fla.1966)(emphasis in original). See also Newman v. State, 602 So.2d 1351, 1352 (Fla. 3d DCA 1992)("Under the constitutional provision [of Art. V, S 8, Fla. Const.], a person must be a member of the Bar for five years at the time he or she takes office, not at the time of qualifying.").

6. That on the issue of residency, the Third District Court of Appeal very recently stated that, "Florida courts have consistently recognized that an individual's intent is a subjective factor and 'the best proof of one's domicile is where [the person] says it is.' " Perez v. Marti, 25 Fla. L. Weekly D2184[, 770 So.2d 176, 2000 WL 1234056] (Fla. 3d DCA Sept. 1, 2000) quoting Ogden v. Odgen[Ogden], 159 Fla. 604, 609, 33 So.2d 870, 873 (Fla.1947), reh'g denied, Perez v. Marti, No. 3D00-2441[, --- So.2d ----, 2000 WL 1234056] (Sept. 22[1], 2000) (Sorondo, J., specially concurring) (calling for Legislature to adopt specific statutory language to clarify residency requirements for political office).

7. That Defendant MENDEZ in her Oath of Candidate stated that she resided in Broward County, however the parties have stipulated that as of the week of September 18, 2000, she is a resident of Miami-Dade County.

8. That Defendant MENDEZ solicited and received a legal opinion from the Division of Elections dated July 11, 2000 which informed her that she needed to establish her residency at the time she assumed office in the event she was elected and she has already done so.

WHEREFORE, it is ORDERED and ADJUDGED:

1. The Court GRANTS Final Judgment in favor of Defendants MENDEZ, HARRIS AND LEAHY.

Lastly, we certify conflict with the Fourth District Court of Appeal's opinion in Miller v. Gross, No. 00-2951 (Fla. 4th DCA Aug. 30, 2000). This Court will not entertain any motion for rehearing.

Affirmed.

Miller v. Mendez, 767 So.2d 678 (Fla. 3d DCA 2000).

STATEMENT OF THE ISSUES

I.

WHETHER MENDEZ WAS QUALIFIED

TO RUN FOR CIRCUIT COURT JUDGE?

II.

WHETHER JURISDICTION WAS PROPERLY ACCEPTED

WHERE THE DISTRICT COURT CERTIFIED CONFLICT?

SUMMARY OF THE ARGUMENT

The decision of the District Court, that a candidate for Circuit Court is required to fulfill residency requirements at the time of assuming office and not at the time of qualification or election, is consistent with the Florida Constitution, decisions of the Florida Supreme Court, the statues concerned and the opinions of the Division of Elections, all of which are inconsistent with the position urged by the Petitioner. Therefore, this Court should affirm the District Court's opinion that candidates for Circuit Court are not required to reside in the territorial jurisdiction of the court until assuming office.

ARGUMENT

I.

MENDEZ WAS ELIGIBLE TO RUN FOR CIRCUIT COURT JUDGE.

(Restated).

The Judgment of the Circuit Court in this case, holding that candidate Mendez was not required to reside in the territorial jurisdiction of the court at the time of qualifying to run for election, is consistent with the Florida Constitution, consistent with precedent from the Florida Supreme Court and consistent with the opinions of the Division of Elections. Therefore, the Circuit and District courts properly found that Respondent Mendez was eligible to run for Circuit Court Judge.

A. The Constitutional Provision.

The Constitutional provision concerned in this matter provides:

> SECTION 8. **Eligibility. –No person shall be eligible for office of justice or judge of any court unless the person is an elector of the state and resides in the territorial jurisdiction of the court.** (emphasis added).

Art. V, § 8, Fla. Const.

B. Definitions Do Not Support Petitioner's Position.

First, the Petitioner relies on the dictionary definitions of the term, "eligibility." (Brief of Petitioner, 8-9). According to the unabridged dictionary, the definition of "eligible" is"

> **1.** fit or proper to be chosen; worthy of choice; desirable: *to marry an eligible bachelor.* **2.** meeting the stipulated requirements, as to participate, compete, or work; qualified. **3.** legally qualified to be elected or appointed to office: *eligible for the presidency.* – n. **4.** a person or thing that is eligible: *among the eligibles, only a few are running for office.*

RANDOM HOUSE UNABRIDGED DICTIONARY, 632 (2d ed. 1993).

According to the current edition of Blacks, the definition is:

> Fit and proper to be selected or to receive a benefit; legally qualified for an office, privilege, or status.

BLACK'S LAW DICTIONARY, 538 (7TH ed.1999).

There is certainly nothing in these definitions which definitively supports the Petitioner's claim, allegedly based on dictionary definitions, that, "[i]f at the time a candidate files papers, the candidate is not a resident of the territorial jurisdiction of the court in which the office is sought, the candidate is not qualified to be chosen nor capable of serving." (Brief of Petitioner, 9). The dictionary definitions have not overruled, or even called into doubt, the prior decisions of this Court on the issue.

C. The Third District is Consistent With The Florida Supreme Court.

The Supreme Court, in referring to an amendment to Article V of the previous Constitution, said, "[t]he words therein '* * * **no person shall be eligible for the office of judge** * * * unless he is, and for a period of five years has been, a member of the Florida bar' **refer to eligibility at the time of assuming office and not at the time of qualification or election to office.**" (emphasis added) In re Advisory Opinion to the Governor, 192 So. 2d 757, 759 (Fla. 1966). This language has been recently cited, and quoted (in significant part) with approval in In re Advisory Opinion to the Governor - Terms of County Court Judges, 750 So. 2d 610, 613 (Fla. 1999).

It is axiomatic that, "the construction of an old Constitution still applies to a new Constitution if the wording is the same . . .". In re Advisory Opinion to the Governor, 112 So. 2d 843 (Fla. 1959).

Additionally, State v. Grassi, 532 So. 2d 1055 (Fla. 1986), held that eligibility requirements for county commissioners, pursuant to an analogous provision of the Florida Constitution, did not require residency at the time of qualification as a candidate.

Therefore, in the absence of any intervening authority from this Court to the contrary, the decision of the Third District is completely consistent with binding

authority from this Court, but inconsistent with the position urged by the Petitioner.

The Petitioner relies on the fact that the Fourth District points out in Miller v. Gross, 25 Fla. L. Weekly D2485 (Fla. 4th DCA Aug. 30, 2000), rev. denied, 770 So. 2d 159 (Fla. 2000), in distinguishing this case from the 1966 Advisory Opinion case, that the provision they are interpreting did not exist at the time that Advisory Opinion was decided and opines that, "Article V, section 8, provides that a person is not *eligible* for a judicial office unless she resides in the territorial jurisdiction of the court to which she seeks election." (original emphasis). (Brief of Petitioner, 9). Thus according to the Petitioner and the Fourth District, the drafters of Article V, § 8 used language virtually identical to that which had been interpreted by the Supreme Court to mean eligibility at the time of assuming office to mean something totally inconsistent with the Supreme Court's interpretation. It is respectfully submitted that the drafters and electorate may be presumed to be cognizant of judicial decisions on a subject on which they draft and adopt an amendment. See generally Nicoli v. Baker, 668 So. 2d 989, 991 (Fla. 1996), Ford v. Wainwright, 451 So. 2d 471, 475 (Fla. 1984). "The normal rule of statutory construction assumes that 'identical words used in different parts of the *same act are intended to have the same meaning.*'" (original emphasis). Sorenson v.

Secretary of Treasury of U.S., 475 U.S. 851, 860, 106 S.Ct. 1600, 1606, 89 L.Ed.2d 855 (1986). Analogizing to this situation, it would seem that virtually identical words used in different parts of the same constitutional article should have the same meaning, as well. Additionally, the general rule is that, ". . . the construction of an old Constitution still applies to a new Constitution if the wording is the same . . ." In re Advisory Opinion to the Governor, 112 So. 2d 843, 847 (Fla. 1959). Further, it is counterintuitive to believe that virtually identical language would be used in two sections of the same article of the Constitution to convey inconsistent meanings.

D. The District Court Decision is Consistent With The Rules of Statutory Interpretation.

§ 105.031(4)(b), Florida Statutes (1999) requires all candidates for judicial office to subscribe to an oath which states, in part:

> he or she: is a candidate for the judicial office of ...; that his or her legal residence is ... County, Florida; that he or she is a qualified elector of the state and of the territorial jurisdiction of the court to which he or she seeks election. . . .

§ 105.031(4)(b), Fla. Stat. (1999).

If reasonably possible, statutes must be interpreted in such a manner as to uphold their constitutionality. See State v. Mitro, 700 So. 2d 643, 645 (Fla. 1997).

Where the Constitution establishes qualifications for an office, the Legislature may not impose additional qualifications. State v. Grassi, 532 So. 2d 1055 (Fla. 1998). In Grassi, a Florida Statute which required a county commissioner to be a resident of the district from which he qualified at the time of qualification, rather than the time of taking office, was unconstitutional for imposing additional qualifications beyond those required by the constitution. Grassi, which was a Fourth District decision before being approved by the Supreme Court, [1] was not distinguished, or even mentioned in the recent Miller v. Gross opinion.

Therefore, if the statute requiring the oath establishes qualifications in addition to those of the Constitution, as would be the case if it required eligibility at time of qualifying as a candidate, it would be unconstitutional. It is respectfully submitted that the statute must be harmonized with the Florida Constitution, as it has been interpreted by the Supreme Court. The Petitioner instead urges that Constitutional interpretation must be subordinated to the statute. See generally Op. Div. Elect. 92-10 (June 24, 1992) (opining that the statutory oath required of a county commission candidate refers to qualifications applicable when the term of office he seeks begins).

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[1] State v. Grassi, 492 So. 2d 474 (Fla. 4th DCA 1986).

Thus, the Third District's decision is consistent with § 105.031(4)(b), Fla. Stats. (1999) if the statute is to be interpreted in a constitutional manner. The Petitioner's position is not.

E. Miller v. Gross, 25 Fla. L. Weekly D2485 (Fla. 4th DCA Aug. 30, 2000), rev. den., 770 So. 2d 159 (Fla. 2000) is Inconsistent With This Court on the Law.

The Fourth District, in Miller v. Gross, 25 Fla. L. Weekly D2485 (Fla. 4th DCA Aug. 30, 2000), rev. den., 770 So. 2d 159 (Fla. 2000), presents the question it is deciding as, ". . . whether a serving judge in one county is qualified to run for election to a judicial office in another county." Id. at 1. This simply masks the central issue determined; whether residency is required at the time of qualification or when the office is assumed. The Fourth District concluded that Judge Miller must be a resident of Dade County because she continues to serve as a Judge therein, and the Florida Constitution requires that judges reside in the territorial jurisdiction of the court they are presiding in. Id. at 2-3). The Fourth District considered this, ". . . the most convincing evidence of Judge Miller's present intent . . ." which it considered critical to the residency issue. Miller v. Gross at 2. Florida courts have long recognized that the best proof of one's residence is where one says it is. See, Perez v. Marti, 770 So. 2d 176 (Fla. 3d DCA 2000); Ogden v.

Ogden, 33 So. 2d 870, 873 (Fla. 1947). Candidate Mendez was not a sitting Judge at the time concerned and is undisputedly a resident of Miami-Dade County, although she was a resident of Broward County at the time that she signed the Oath of Candidate.

Section C, above, explains how the majority opinion in Miller v. Gross is inconsistent with prior decisions of this Court. However, there is also a problem in the concurring opinion.

Judge Gross, in his concurring opinion in Miller v. Gross, also relies upon § 34.021(1), Fla. Stats. (1999), which requires that county court judges be members in good standing of the Florida Bar for five years, ". . . prior to qualifying for election to such office . . . ." This statute, however, is irrelevant to the current situation, involving candidacy for the circuit court. The Constitutional provision which applies to that situation provides that, "**Unless otherwise provided by general law**, no person is eligible for the office of **county court judge** unless the person is, and has been for the preceding five years, a member of the bar of Florida. . . ." Art. V, § 8, Fla. Const. No such permission for additional qualifications set by general law is provided for circuit judge candidates. Therefore, the decision of the lower court, in this case, is consistent with that statutory provision, as well.

Petitioner's reliance on the statutory oath has been responded to in section D above.

F. The Trial Court Decision is Consistent With Division of Elections Opinions.

It is the opinion of the Division of Elections that, with respect to judges, residency eligibility requirements must be established, "at the time of assuming office." Op. Div. Elect. 94-04 (Mar. 3, 1994). This is consistent with its earlier opinion, regarding candidacy for a county commission seat, that, ". . . the statutory oath a person is required to take upon qualifying for office refers to qualifications applicable when the term of office he seeks begins." Op. Div. Elect. 92-10 (June 24, 1992). It is similarly consistent with its opinion that the five year bar membership requirement referred to the time of assuming office, not the time of qualification as a candidate. Op. Div. Elect. 78-31 (Aug. 3, 1978). This was, of course, in accord with In re Advisory Opinion to the Governor, 192 So. 2d 757 (Fla. 1966).

"[A]n agency's interpretation of a statute it is charged with enforcing is entitled to great deference." Ameristeel Corp. v. Clark, 691 So. 2d 473, 477 (Fla. 1997). Thus, to the extent that §§ 34.021(1) and 105.031(4)(b) may be utilized to support an interpretation of Art. V, § 8 of the Florida Constitution, the position

promulgated by the Division of Elections should be deferred to, if possible. The decision of the Third District in this case is consistent with this policy.

Thus, the decision of the District Court is supported by the Constitution, prior decisions of this Court, and opinions of the Division of Elections, while the position promulgated by the Petitioner is inconsistent with them. The District Court should be affirmed on this basis.

II.

JURISDICTION WAS PROPERLY ACCEPTED WHERE THE DISTRICT COURT CERTIFIED CONFLICT.

The Petitioner, in Point on Appeal, "b," urges this Court to retain jurisdiction notwithstanding the fact that Mendez lost. Respondent, HARRIS, agrees that this Court should retain jurisdiction, but based upon the ground that it should approve, rather than reject, the holding of the Third District in this case.

This case and that in Miller v. Gross, 25 Fla. L. Weekly D2485 (Fla. 4th DCA Aug. 30, 2000) may be distinguished where the issue in that case was, "whether a serving judge in one county is qualified to run for election to a judicial office in another county . . . .", a situation not applicable in this case. However, the Third District, in this case, relied on authority from this Court that the Fourth

District, in Miller v. Gross, distinguished on grounds which would appear to be equally applicable to this situation.

The Third District held:

> 4. That the Florida Supreme Court has ruled that the eligibility requirements set forth in the Florida Constitution, referred "to eligibility at the time of assuming office and not at the time of qualification or election to office." In re Advisory Opinion to the Governor, 192 So.2d 757, 759 (Fla.1966).
>
> 5. That the Florida Supreme Court recently had the opportunity to address the issue of eligibility requirements and concluded that, "[T]he eligibility requirements 'refer to eligibility at the time of assuming office not at the time of qualification or election to office.' " In re Advisory Opinion to the Governor--Terms of County Court Judges, 750 So.2d 610, 613 (Fla.1999) quoting In re Advisory Opinion to the Governor, 192 So.2d 757, 759 (Fla.1966)(emphasis in original). See also Newman v. State, 602 So.2d 1351, 1352 (Fla. 3d DCA 1992)("Under the constitutional provision [of Art. V, S 8, Fla. Const.], a person must be a member of the Bar for five years at the time he or she takes office, not at the time of qualifying.").

Miller v. Mendez at 678.

The Fourth District, in Miller v. Gross, had the following to say:

> We do not read *In re Advisory Opinion to the Governor* [2] as applying to the present case. In the first place, we note that article V, section 8, was adopted several years after *In re Advisory Opinion to the Governor* was decided. Article V, section 8, provides that a person is not *eligible* for a judicial office unless she resides in the territorial jurisdiction of the court to which she seeks election. There is nothing in article V, section 8, or in any statute she has cited to us

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[2] Referring to In re Advisory Opinion to the Governor, 192 So. 2d 757 (Fla. 1966)

> suggesting that she can qualify for election to an office to which she in ineligible at the time of qualifying. In fact Judge Miller signed an Oath of Candidate saying that "I am qualified under the Constitution and Laws of Florida to hold the office to which I desire to be . . . elected." [e.s.] Her Oath says "I am qualified," not I will be qualified when I actually take office. (footnote omitted).
>
> Moreover, we sense that article V, section 8, has a purpose to insure that judges come from the community within the territorial jurisdiction of the court. While judges may not represent that territory in the same way that legislators do, it is quite understandable that the citizens of Florida would want their judges to be acquainted with the problems of the community, to be familiar with its history and mores, to have actually lived within its confines and experienced its recent history, in order to judge its cases.

Id.

Thus, the Fourth District would find In re Advisory Opinion to the Governor, 192 So. 2d 757 (Fla. 1966) inapplicable to situations that the Third District would apply it to. It is, therefore, appropriate that the Third District would certify conflict, as it did, and that this Court accept jurisdiction in order to maintain consistency on this recurring issue. See, Miller v. Mendez at 679.

Further, the opinion in this case notes that, ". . . on the issue of residency, the Third District Court of Appeal very recently stated that, 'Florida courts have consistently recognized that an individual's intent is a subjective factor and 'the best proof of one's domicile is where [the person] says it is.'". (citations omitted). Miller v. Mendez at 679. The Fourth District, in Miller v. Gross, notes

that Judge Miller stated her intent to be, and that she presently is, a resident of Broward County, Florida. However, it held that, ". . . the most convincing evidence of Judge Miller's present intent is that she continues to serve as a Count Judge in Dade County, Florida, which requires under the Florida Constitution that she reside in Dade County, Florida." Id. This further conflict should also be resolved by this Court.

Therefore, conflict exists in the language and reasoning of the district courts, regarding situations likely to recur. This Court should continue to assert jurisdiction over the matter in order to resolve matters of public importance.

CONCLUSION

Based upon the foregoing reasons and authorities, it is respectfully submitted that this court should approve the analysis of the Third District Court of Appeals and Affirm.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to ALEX T. BARAK, ESQ., Emerald Hills Executive Plaza, 4601 Sheridan Street, Suite 206, Hollywood, FL 33021-3432 and CHRISTOPHER D. BROWN, ESQ., Bilzin Sumberg Dunn Price & Axelrod, LLP, 2500 First Union Financial Center, 200 S. Biscayne Blvd., Miami, FL 33131, on this 12th day of January, 2001.

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