IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC00-2096



IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
THIRD DISTRICT

Case No. 3D00-2746

ARI MILLER,

Petitioner,

vs.

GINA MENDEZ,

KATHERINE HARRIS,
As Secretary of State and

DAVID LEAHY,
As Supervisor of Elections of
Miami-Dade County,

Defendants.

_____/

# PETITIONER'S INITIAL BRIEF ON THE MERITS

ALEX T. BARAK,
Attorney for Petitioner
LAW OFFICES OF ALEX T. BARAK, P.A.
Emerald Hills Executive Plaza
4601 Sheridan Street, Suite 206
Hollywood, Florida 33021-3432

## TABLE OF CONTENTS

## TABLE OF CITATIONS

CASES



STATUTES



OTHER AUTHORITIES

## STATEMENT OF CASE AND FACTS

On September 8, 2000, Plaintiff/Appellant Ari Miller filed a lawsuit against Gina Mendez, Katherine Harris, As Secretary of State and David Leahy, As Supervisor of Elections of Miami-Dade County. (A.1-11). Miller's complaint was for declaratory and injunctive relief. The declaration sought was that Gina Mendez is not qualified to run for circuit court judge for the Eleventh Judicial Circuit in Group 25 because she was not a resident of Miami-Dade County on the date of filing her oath of candidate on July 18, 2000, (A. 6,11), such candidacy which is contrary to the requirements of Article V, Section 8 of the Florida Constitution and a recent decision in the Fourth District Court of Appeal, Miller v. Gross, 25 Fla. L. Weekly D2485 (Fla. 4th DCA August 30, 2000).

Based on the verified complaint (A. 1-5) and facts as stipulated by Plaintiff Ari Miller and Defendant Gina Mendez ("Mendez") (A. 19-25), Circuit Judge Bernard Shapiro made findings including in particular that Gina Mendez in her Oath of Candidate (filed on July 18, 2000) (A. 6,11) stated that she resided in Broward County, Florida. (A. 61). This was done pursuant to her offering herself as a candidate for circuit court judge for the Eleventh Judicial Circuit. Another stipulated fact was that Mendez had been a resident of Broward County since December, 1997. (A. 20). This period of time is up to and including July

18, 2000. Mendez has not amended her oath of candidate at any time since filing it, and certainly not before the close of qualifying on July 21, 2000.

On September 26, 2000, the trial court entered a final judgment (A. 60,61) against the Petitioner declaring that the Respondent Gina Mendez was eligible to be a candidate for circuit court judge in the Eleventh Judicial Circuit of Florida in the election which was to be held on November 7, 2000. [1] The court ruled that the eligibility requirements as set forth in Article V, Section 8 refer to eligibility at the time of assuming office and not at the time of qualification or election to office.

On September 27, 2000 a notice of appeal was filed in the Third District Court of Appeal (A. 62,63) On September 28, 2000 an Emergency Plenary Appeal (A. 64 - 72) was filed therein along with the suggestion that the final judgment to be reviewed should be certified by the district court to the Florida Supreme Court (A. 73-79).

On October 5, 2000 the Third District Court of Appeal affirmed the trial court and adopted the trial court's order in its entirety as their own (A. 80-83). Further, they certified conflict with the Fourth District Court of Appeal Decision in Miller v Gross, 25 Fla. L. Weekly D2485 (Fla. 4th DCA August 30, 2000). (A. 84-

[1] Gina Mendez was not elected. It is our position which will be argued further herein, that regardless, this appeal should still be ruled upon.

86).

Notice to invoke the discretionary jurisdiction of the Supreme Court was filed on October 6, 2000 citing the certification of this direct conflict.

## SUMMARY OF ARGUMENT

The decision of the Third District Court herein is that constitutional eligibility for judicial office, in terms of the residency requirement, is determined at the time the elected candidate assumes office in January. This decision directly conflicts with the decision of the Fourth District Court of Appeal in *Miller v. Gross*, 25 Fla. L. Weekly D2485 (Fla. 4th DCA August 30, 2000), which held that the time for determining this eligibility is in July when a judicial candidate files for office. The relevant facts in both cases are the same.

Given that the Florida Constitution must be interpreted the plain way it is written, given the plain meaning of the word "eligible" and given the fact that the oath of candidate is made in the present tense, the Fourth District has interpreted Article V, Section 8 of the Florida Constitution correctly.

Although Gina Mendez lost the election for the judicial office in question, the certified conflict created by these two decisions still exists. This conflict is still one in which the public may have an intense concern growing out of private litigation. Since Florida voters will continue electing its trial court judges for the foreseeable future, the correct interpretation of this constitutional provision must be decided lest it continue to threaten the integrity of the electoral process.

This Court should rule in this matter and reverse the Third District Court of Appeal.

## ARGUMENT

a. Eligibility for a judicial office, according to Article V, Section 8 means eligibility at the time of filing for candidacy.

The issue in this case is when must a candidate for judicial office satisfy the residency requirement of the the Florida Constitution and thereby be eligible to seek by election a judicial office; at the time one files for the office in July, or upon being elected and assuming the office.

The Florida Constitution in Article V, Section 8 states:

> No person shall be eligible for office of justice or judge of any court unless he is an elector of the state and resides in the territorial jurisdiction of the court.

The trial court ruling herein which was adopted in its entirety by the Third District Court of Appeal found that Article V, Section 8 does not expressly specify when a candidate for judicial office must establish his or her residency requirements, but it construed this provision to mean at the time of assuming office.

The Florida Constitution must be interpreted the plain way it is written. Thomas v.Cobb, 58 So.2d 173, 174 (Fla. 1952) (en banc). "Every provision of [the constitution] was inserted with a definite purpose...." Id. The plain meaning of "eligibility" is "fit to be chosen for some purpose or duty,...qualified to be chosen..." THE NEW WEBSTER'S COMPREHENSIVE DICTIONARY OF THE ENGLISH LANGUAGE 318 (deluxe ed. 1985). BLACK'S LAW DICTIONARY 521 (6TH ED.

1990) also defines "eligible" as "fit and proper to be chosen...Capable of serving, legally qualified to serve...capable of being chosen as a candidate for office." (emphasis added). Our society and courts would reap advantages if a judicial candidate is required to meet residency requirements at the time of filing because it guarantees that benefits of residency are met. If 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.

In the instant case the court relies on In re Advisory Opinion to the Governor, 192 So.2d 757 (Fla. 1966) to construe the meaning of the term "eligible." This case does not apply to the one at bar. To begin with, Art. V, Sec. 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 one resides in the territorial jurisdiction of the court to which one seeks election. There is nothing in Article V, Section 8, or in any statute that suggests that one can qualify for election to an office to which one is ineligible at the time of qualifying. Miller v. Gross, 25 Fla. L. Weekly D2485 (Fla. 4th DCA August 30, 2000).

In addition, In re Advisory Opinion to the Governor can be further distinguished from the instant case as it discusses a different section of the constitution, and the discussion itself is dictum. "Dicta is at most persuasive and

cannot function as ground breaking precedent." State v. Hubbard, 751 So.2d 552, 564 (Fla. 1999).

In the instant case the court also relies on In re Advisory Opinion to the Governor - Terms of County Court Judges, 750 So.2d 610, 613 (Fla. 1999) for holding that the eligibility requirements refer to eligibility at the *time of assuming office* and not the time of qualification or election to office. (Emphasis in original).

In re Advisory Opinion to the Governor - Terms of County Court Judges, though can be distinguished from the instant case. It decided whether the newly passed constitutional amendment increasing county court judges terms from four to six years applied to all county court judges, or only those judges who assumed office after the constitutional amendment took effect. It did not address that portion of Article V, Section 8 regarding the time for determining eligibility (in terms of residency) for being a judge.

Further, the Oath of Candidate which a judicial candidate is required to sign states that "I am qualified under the Constitution and Laws of Florida to hold the office to which I desire to be...elected." The Oath says "I am qualified," not I will be qualified when I actually take office. It also makes clear that the time for determining legal residence is at the time of qualifying, not when the term of office actually begins. Miller v. Gross.

It is quite understandable that the citizens of Florida would want their judges

to have actually lived within its confines in order to judge its cases. Id.

"Eligibility" under Article V, Section 8 of the Florida Constitution is measured at the time a candidate qualifies for the election in July, not at the beginning of the term the following January. Id.

b. Although the Respondent Gina Mendez was not elected, this court must rule as the Third District Court of Appeal has certified conflict with the Fourth District Court of Appeal opinion in *Miller v. Gross*, 25 Fla. L. Weekly D2485 (Fla. 4th DCA August 30, 2000).

In Ansin v. Thurston, 101 So.2d 808, 811 (Fla. 1958), this Court ruled that constitutional limitation of Supreme Court review to decisions in 'direct conflict' clearly evinces a concern with decisions as precedents as opposed to adjudications of the rights of particular litigants. This Court held similarly in the more recent case of Mystan Marine Inc., v. Harrington, 339 So.2d 200, (Fla. 1976). Although Respondent Gina Mendez may have lost and Petitioner Ari Miller may no longer need his right to choose between two qualified candidates adjudicated, what still remains is the fact there are two conflicting precedents involving interpretations of eligibility as it relates to the residency requirement of Article V, Section 8 of the Florida Constitution. In Lake v. Lake, 103 So.2d 639, 642 (Fla. 1958), this Court ruled that cases involving direct conflict deal with matters of concern beyond the

interests of the immediate litigants.

Although the three afore cited cases were decided before Article V, Section 3 (b) of the Florida Constitution was amended in 1980 to include Section 3 (b) (4), they have not been overruled, and are still relevant. Article V, Section 3 (b) (4) as amended in 1980 creates a narrower class of cases for which review may yet be sought but is even rarer than the "direct conflict" cases previously cited. It is respectfully submitted that this class of cases magnifies the need and the importance for this Court to decide such cases, like the instant one. A district court of appeal, recognizes the need for the Supreme Court to reconcile two contrary decisions on the same point of law, in an effort to keep the law stable, harmonious and uniform, and certifies the conflict with another district court of appeal.

As a practical matter, within the last two weeks, all of Florida's 67 counties have opted to keep electing their trial court benches as opposed to merit selection and retention. Generally, the electoral process is a time sensitive one, and in the future, the integrity of this process may again be at stake if an unqualified judicial candidate's name is placed on the ballot or if a qualified candidate's name is removed, resulting in voters being disenfranchised of the fundamental right to choose among qualified judicial candidates.

At the present time, the decision herein of Third District Court of Appeal construes eligibility with regard to the residency requirement Article V, Section 8

of the Florida Constitution to mean residency at the time (after election) of assumption of judicial office in January. The Fourth District Court of Appeal has ruled that this same eligibility is determined at the time the candidate qualifies for judicial office in July. Prospective judicial candidates throughout the state and the public need this Court to determine what is the proper interpretation of eligibility with regard to the residency requirement of Article V, Section 8.

The Florida Constitution, since 1956, has embodied this idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice. Ansin v.Thurston, 101 So.2d 808, 810. To fulfill this role, the Court must rule herein.

## CONCLUSION

Based upon the foregoing reasons and authorities, the order of the Third District Court of Appeal should be reversed.

Respectfully submitted,

LAW OFFICES OF ALEX T. BARAK, P.A.
Attorney for Petitioner/Appellant
Emerald Hills Executive Plaza
4601 Sheridan Street, Suite 206
Hollywood, Florida 33021-3432
(954) 961-6200

By: 
ALEX T. BARAK, FL-BAR # 327697

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by mail this 22nd day of November, 2000 to: Christopher Brown, Esq.,Bilzin Sumberg et al, 200 S. Biscayne Blvd., Miami, Florida, 33131, Charles M. Fahlbusch, 110 S.E. 6th St., Fort Lauderdale, Florida, 33301, Robert A. Ginsburg, County Attorney, 111 N.W. 1st Street, Miami, Florida 33130, Judge Bernard Shapiro, 73 West Flagler Street, Miami, Florida, 33130.

By: _____
ALEX T. BARAK

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, 2000

| | | |
|---|---|---|
| ARI MILLER, | ** | |
| Appellant, | ** | |
| vs. | ** | CASE NO. 3D00-2746 |
| GINA MENDEZ, KATHERINE HARRIS, as Secretary of State, and DAVID LEAHY, as Supervisor of Elections of Miami-Dade County, | ** | LOWER TRIBUNAL NO. 00-24104 |
| Appellees. | ** | |

Opinion filed October 5, 2000.

An appeal from the Circuit Court for Dade County, Bernard S. Shapiro, Judge.

Alex T. Barak, for appellant.

Bilzin Sumberg Dunn Baena Price & Axelrod and Christopher D. Brown, for appellee Gina Mendez.

Robert A. Butterworth, Attorney General, and Charles M. Fahlbusch, Assistant Attorney General, for appellee Katherine Harris as Secretary of State.

Robert A. Ginsburg, Dade County Attorney, and William X. Candela, Assistant County Attorney, for appellee David C. Leahy as Supervisor of Elections of Miami-Dade County.

Before JORGENSON, COPE and GODERICH, JJ.

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, § 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 (Fla. 3d DCA Sept. 1, 2000) quoting Ogden v. Odgen, 159 Fla. 604, 609, 33 So. 2d 870, 873 (Fla. 1947), reh'g denied, Perez v. Marti, No. 3D00-2441 (Sept. 22, 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.

**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

**CASE NO. : SC00-2096**

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
THIRD DISTRICT

Case No. 3D00-2746

ARI MILLER,

Petitioner,

vs.

GINA MENDEZ,

KATHERINE HARRIS,
As Secretary of State and

DAVID LEAHY,
As Supervisor of Elections of
Miami-Dade County,

Defendants.

_____/

PETITIONER'S CERTIFICATION
OF SIZE AND STYLE OF FONT

I HEREBY CERTIFY that the size and the style of font used in Petitioner's Brief was 14 point Times New Roman.

ALEX T. BARAK,
Attorney for Petitioner

LAW OFFICES OF ALEX T. BARAK, P.A.
Emerald Hills Executive Plaza
4601 Sheridan Street, Suite 206
Hollywood, Florida 33021-3432
(954) 961-6200

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by mail this 22nd day of February, 2001 to: Christopher Brown, Esq.,Bilzin Sumberg et al, 200 S. Biscayne Blvd., Miami, Florida, 33131, Charles M. Fahlbusch, Office of the Attorney General, 110 S.E. 6th St., 10th Floor, Fort Lauderdale, Florida, 33301 and Robert A. Ginsburg, County Attorney, 111 N.W. 1st Street, Miami, Florida 33130.

BY: Alex Barak
ALEX T. BARAK