IN THE SUPREME COURT
STATE OF FLORIDA
CASE NOS. SC01-2062, SC01-2079

PHYSICIANS HEALTHCARE
PLANS, INC., ET AL.

Defendants/Petitioners,

v.

RAYMOND PFEIFLER, ET UX.

Plaintiffs/Respondents.
_____/ L.T. Case No. 98-013485

KHURSHID KAHN, M.D., ET AL.

Defendants/Petitioners,

v.

RAYMOND PFEIFLER, ET UX,

Plaintiffs/Respondents.
_____/

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

OF SEVENTEENTH JUDICIAL CIRCUIT

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THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA (hereafter "Seventeenth Circuit"), through its undersigned attorneys, pursuant to the request of this Court, hereby submits its Response to the Petitions for Writ of Prohibition or for relief under the "All Writs" power, and states:

PRELIMINARY STATEMENT

Overview. The petitions filed in these consolidated cases seek to prohibit the assignment of a senior judge to hear the pending medical malpractice action in which the Petitioners are defendants and, more generally, the petitions seek to enjoin the Seventeenth Circuit from assigning senior judges, should the assigned circuit court judge request and the administrative judge agree, to hear long duration civil trials. This Court, on October 15, 2001, entered an order which requested a response from the Respondents (the plaintiffs in the underlying action) as well as a response from the Seventeenth Circuit.

Parties. The Petitioner in Case Number SC01-2062 is, PHYSICIANS HEALTHCARE PLANS, INC. and will be referred to herein as "PHP." The Petitioners in Case Number SC01-2079 are, KHURSHID KHAN, M.D., EMSA SOUTH BROWARD, INC. and SOUTH BROWARD HOSPITAL DISTRICT d/b/a/ MEMORIAL REGIONAL HOSPITAL and they will be collectively

identified as "Kahn Petitioners." The Respondents in both cases are Raymond Pfeifler and his wife, Cynthia Pfeifler, and they will be designated as "Respondents."

References to the Appendices. Documents included in the Appendix to the petition filed by PHP will be references as "PHP App." and the Appendix to the petition filed by the Kahn Petitioners will be designated as "Kahn App.. The Appendix to this Response will be identified as "Rsp. App."

FACTS

The Factual Background and Procedural History of the Cases set forth by the Petitioners, although generally correct, does contain certain material omissions which are corrected and placed in context below as a condition of the Seventeenth Circuit's acceptance thereof:

I. Relevant Orders, Memos and Assignments.

Chief Justice Shaw of this court provided for the alternative methods for the assignment of senior judges in his memorandum of June 4, 1991:

> a. The chief judge may identify those senior judges who have agreed to serve during the fiscal year in his/her circuit and provide such names to the Office of the Chief Justice (directed to the attention of Ms. Mary Ann Chalmers). My office will then prepare an open order of assignment for each of the senior judges, for the fiscal year. The order will not specify the case(s) to which the judge may be assigned nor limit the number of days, as has been past practice. Instead, the

order will be drawn so as to permit the designated judge to serve anytime during the year on such cases or for as many days as may be approved by the chief judge.

b. Alternatively, chief judges may continue the practice of requesting that orders of assignment be cut for specific cases or for a fixed number of days, as in the past. This may be best for those circuits using senior judges less frequently or where it is difficult to identify in advance senior judges who might be available and willing to serve.

(PHP App., 2-3).

That memorandum also made suggestions regarding priorities:

b. Whenever possible, senior judges should be used in accordance with the following priorities:

(1) short term emergencies due to illness or other unforeseen circumstances;

(2) speedy trail rule problems and for coverage of criminal dockets, including statewide prosecution/grand jury cases that would otherwise be disruptive of criminal calendars;

(3) other long duration criminal trials

(4) special categories of cases where an available senior judge has developed the necessary expertise (e.g. asbestosis cases);

(5) vacancies due to retirement or death;

(6) incapacity of a judge;

(7) during the suspension of judges pending completion of criminal or Judicial Qualifications

> Commission investigations;
>
> (8) planned medical absences;
>
> (9) maternity leave;
>
> (10) case requires non-resident judge and no active judges are available in adjacent circuits/counties;
>
> (11) long duration civil trials that would otherwise be disruptive of civil calendars. . . . (emphasis supplied).

(PHP App., 3-4).

Subsequently, on March 19, 1992, the Chief Judge of the Seventeenth Circuit issued Administrative Order No. I-92-J-1, which provided:

> 1. Pending further Order of this Court, all requests for the assignment of a Senior Judge shall conform to the following procedures:
>
> A. The case classification shall be one that is prescribed by the Supreme Courts Memorandum dated June 4, 1991, Exhibit "A".
>
> B. Assignments shall be made in order of priority as indicated in the above referred Supreme Court Memorandum.
>
> 2. When a Judge determines that a case assigned to him/her meets the criteria above, and desires a senior judge be assigned to hear the case, he/she shall submit a written request to the Administrative Judge of his/her division.
>
> 3. The Administrative Judge shall forthwith:
>
> A. Contact each judge of the division to seek a temporary assignment of another active judge to handle the case.

B. If an active judge is unable to accept the assignment the Administrative Judge shall seek the service of a Senior Judge on a pro bono or volunteer basis.

C. Failing in "A" or "B" above, the Administrative Judge shall pass the written request to the Chief Judge, for assignment of a Senior Judge.

(PHP App., 6).`

After that, this Court began issuing, annually, a document entitled Senior Judges Procedures for Assignment. Among other things, it reordered the priority of matters for which senior judges should be utilized, as follows:

b. Senior judges should be used only for the following:

(1) speedy trial rule problems and for coverage of criminal dockets, including statewide prosecution/grand jury cases that would otherwise be disruptive of criminal calendars;

(2) long duration civil trials that would otherwise be disruptive of civil calendars;

(3) special categories of cases where an available senior judge has developed the necessary expertise (e.g., asbestos cases);

(4) other long duration criminal trials.

(5) case requires nonresident judge and no active judges are available in adjacent circuits/counties;

(6) short term emergencies due to illness or other unforeseen circumstances;

(7) planned medical absences, for which coverage cannot be

provided in advance;

(8) parental or other family leave, for which coverage cannot be provided in advance

(9) incapacity of a judge;

(10) vacancies due to retirement, death, or appointment;

(11) during the suspension of a judge pending completion of criminal or Judicial Qualifications Commission investigations;

(12) to preside over a previously heard case;

(13) to cover absences caused by judicial participation in continuing education activities;

(14) to cover absences caused by judicial participation in the statewide committees or councils, or work of the judicial conferences. (emphasis added).

(Rsp. App., Ex. B for FY 1997-98, 2-3; also see Ex. B. for FYs 1998-99, 1999-2000).

This was distributed to the Administrative and other Circuit Court Judges of the Seventeenth Circuit.

Then, on July 20, 2001, Chief Justice Wells issued a Memorandum to the Chief Judges of the Circuit Courts and Trial Court Administrators on the subject of Senior Judge Guidelines and Allocations. (Rsp. App., Ex. C). It attached the Guidelines for the Planning, Management, and Utilization of Senior Judges, Fiscal

Year 2001-2001, of the Senior Judge Workgroup of the Judicial Management Council's Committee on Trial Court Performance and Accountability. (hereafter, "Guidelines"). Among other things, the guidelines that, "[p]lanning for senior judge utilization should be performed by the chief judge in consultation with the administrative judges of the divisions and the trial court administrator." (Rsp. App., Ex. C, Guidelines, p. 1). The guidelines suggested that the senior judge utilization plan should include, "a review of pending cases/clearance rate for each division to determine if there are serious backlogs in cases . . . ." (Rsp. App., Ex. C, Guidelines, p. 1). The guidelines also recommended, "the establishment of docket management practices and trial assignment policies that maximize the use of senior judges' time . . . ." (Rsp. App., Ex. C, Guidelines, p. 2). The Guidelines required that, "[t]he chief judge or his/her designee must complete a copy of the *Assignment of Senior Judges to Judicial Service* (form attached) for each specific assignment . . . ." (Rsp. App., Ex. C, Guidelines, p. 4). That form listed, as the third and fourth of the eighteen reasons for assignment listed on the form:

c. Over-crowded/backlog in circuit civil, family, juvenile probate or county court dockets/calendars

d. Long duration (more than one week) criminal or civil trials

(Rsp. App., Ex. C, Assignment of Senior Judges to Judicial Service).

The Administrative Judge of the Circuit Civil Division of the Seventeenth Circuit conducts the calendar call for the Senior Judge's Docket. [1] He informs the Circuit Judges in the Division of the calendar call and notes that, "[o]nly those cases known to take more than three weeks to try are appropriate for this docket." (Rsp. App., Ex. D, 1). However, there are cases on the docket that are expected to take as little as two (2) weeks (See, Rsp. App., Ex. D, Case Nos. 15, 26, 37) or as many as ten (10) weeks. (See, Rsp. App., Ex. D, Case No. 14). By the same token, it should be noted that not all Circuit Judges of the Seventeenth Judicial Circuit request all long-duration civil trials to be transferred to the Senior Judges' Docket. (See, Rsp. App., Ex. E, Docket of Judge Streitfeld for 1/3/2000, Case No. 10; Docket of Judge Streitfeld for 5/22/2000, Case No. 9); Docket of Judge Streitfeld for 10/8/2001, Case No. 14; Docket of Judge Henning for 10/2/2000, Case No. 1; Docket of Judge E. Moriarty of 7/17/2000, Case No. 1). Also, senior judges are utilized for far more than just long-duration civil cases. Although over-crowded/backlog in circuit civil and long duration civil trials are popular reasons for such utilization (See., Rsp. App., Ex. E, pps. 1-37), criminal case backlog and long-duration criminal trials (and capital cases) are equally popular as reasons for

[1] The undersigned is informed that cases are not reassigned from the original judge, but simply set for trial before the Senior Judges Docket and, if not reached, it goes back to the original judge.

senior judge utilization in the Seventeenth Circuit. (See., Rsp. App., Ex. E, pps. 38-84). [2]

Thus, the utilization by the Seventeenth Circuit of Senior Judges to relieve overcrowded dockets and to handle long-duration trials in both civil and criminal areas appears to be compatible with the instructions and guidance of this Court.

This Court has assigned certain designated senior judges, at the request of the Chief Judge, to serve as temporary judges in the Seventeenth Circuit pursuant to various assignment orders and amended assignment orders through the present date. (Rsp. App., Ex. A). These judges are utilized pursuant to the orders and memoranda set forth above.

After the Petitioners filed their various motions to vacate (See, PHP's App., 325-326; Kahn's App., Exs. 4, 5, 6), the Chief Judge of the Seventeenth Circuit entered an order denying the motions in which he pointed out:

> In Wild, [3] the Florida Supreme Court held that the chief justice's assignment power to the chief judges of the judicial circuits was necessary to the proper administration of our court systems, because the chief judge is best equipped to assess the needs of each trial court

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[2] Indeed, the undersigned is informed that "Division FS," specifically referred to in Robertson v. State, 719 So. 2d 371 (Fla. 4th DCA 1998) was a "Strike Force" composed of senior judges which specifically heard matters concerning in custody criminal defendants, to help ensure alleviation and prevention of jail overcrowding.

[3] Wild v. Dozier, 672 So. 2d 16 (Fla. 1996).

> and to allocate the judicial labor available within the circuit accordingly. Id. at 17-18. When a chief judge exercises the authority delegated to him or her by the chief justice to assign judges on a temporary basis, the chief judge is "acting under the chief justice's constitutional power to make temporary judicial assignments to ensure the speedy, efficient and proper administration of justice within the various circuits. Id. at 18.

(PHP App., 5).

It should also be noted that this Court, on June 6, 2001, pursuant to Administrative Order Number AOSC01-25, established, "a committee to study the issues involved in the appointment and assignment of senior judges . . ." That committee has been directed to provide a report to the Court no later than February 1, 2002. Id. at 2.

II. Judicial Efficiency in the Seventeenth Circuit.

Although the undersigned is unaware of any statistical analysis which would permit the specific evaluation or comparison of the efficiency of the utilization of senior judges within the circuits, the Certifications of Need for Additional Judges prepared by the Office of the State Courts Administrator of the Supreme Court of Florida provides a general picture of the overall efficiency of the use of judges within each of the circuits. The projected filings for 2001 ranks the Seventeenth Circuit fifth, overall, and second among the larger circuits. (Rsp. App., Ex. F, p. 3). Between 1998 and 2001, the projected increase in filings is 1.4%, the sixth

largest increase in the state and the third largest among the large, urban circuits. (Rsp. App., Ex. F, p. 8). The disposition rate for the period January-December, 1999 was 1,632.1 per judge, the fourth best disposition rate in the state and the best among the large urban circuits. (Rsp. App., Ex. F, p. 21). The number of jury trials conducted for 1999 was higher than any other circuit and number of jury trials per judge was 24.2, compared to a statewide average of 14.0 per judge. (Rsp. App., Ex. F, 23). The number of jury trials conducted for the period was up 6.5%, the sixth largest increase in the state. (Rsp. App., Ex. F, p. 24).

The projected 2002 filings per judge in the Seventeenth Circuit ranks the circuit tenth, overall and third among larger, urban circuits. (Rsp. App., Ex. G, p. 3). The disposition rate for the January-December, 1998-2000 period was up 0.3% compared to a statewide average of down 0.1% and fourth of the larger, urban circuits. (Rsp. App., Ex. G, p. 22). The number of jury trials conducted per judge for the period January-December, 2000 was 21.2, the highest of any circuit in the state. (Rsp. App., Ex. G. p. 23). For the year, 2000 the Seventeenth Circuit still conducted more such trials per judge than any other circuit, although it was down by 6.4%, compared to a statewide average of being down 12.3 %. (Rsp. App., Ex. G, 24). This was despite the fact of the Seventeenth Circuit having the greatest certified need for additional judges of any circuit. See In re Certification of Need

for Additional Judges, 780 So. 2d 906 (Fla. 2001).

Thus, it appears that the Seventeenth Circuit is one of the most efficient in the state regarding the management and administration of judges and, especially, the conduct of jury trials.

III. Challenge in the Lower Court.

PHP, on or about July 26, 2000, filed their amended motion to vacate order setting trial and pre-trial procedures. It stated:

> 2. Defendant, PHYSICIAN'S HEALTHCARE PLANS, INC., objects to this case being assigned to the retired Senior Judge's jury trial docket as such assignment is unconstitutional. Such assignments, one [sic] a regular basis, and of cases with complex issues, is in violation of the Supreme Court guidelines and the Florida Constitution. Art. V, §10(b)(1), Fla. Const.; Pyret [sic] v. Adams, 500 So. 2d 136 (Fla. 1986); Wild v. Dozier, 672 So. 2d 16 (Fla. 1996).

(PHP App., 325-26).

This motion was virtually identical to PHP's original motion to vacate of July 24, 2000 (Kahn App., Ex. 4), which was joined in by the Kahn Petitioners. (See, Kahn App., Ex. 5). PHP, on or about August 29, 2000, filed a memorandum in support of the motion. (Kahn App., Ex. 6). This memorandum claimed that the use of the Senior Judges Docket was a permanent, rather than a temporary assignment and, therefore, unconstitutional. (Kahn App., Ex. 6, 5-6). It also alleged that it deprived the qualified electors of the territorial jurisdiction of the

Court of their right to elect judges (Kahn App., Ex. 6, 67). It contended that the utilization of senor judges for convenience, rather than necessity or emergency, was a constitutional violation. (Kahn App., Ex. 6, 7-8). It also claimed that complex medical malpractice cases were being assigned to senior judges, in violation of the wishes of this Court. (Kahn App., Ex. 6, 7-8).

However, the parties below did not contend that the Senior Judge Docket denied them access to the courts, constituted an actual 'division" required to be created by local rule or that senior judges who could not be considered "retired" were being utilized. (See, Kahn App., Ex. 6).

THE NATURE OF THE RELIEF SOUGHT

The, Khan Petitioners seek a writ prohibiting, ". . . the Seventeenth Circuit from assigning senior judges in Broward County, Florida to preside over "long trial" medical malpractice and other "complex litigation" cases to the exclusion of all other cases." (Khan Petition, 2). This may be somewhat confusing, given the variety of work that senior judges appear to do within the circuit. In addition to the criminal cases (See, Rsp. App., Ex. E, 38-84), such judges appear to do an assortment of different kinds of judicial work. Judge Williams, for example, heard matters on 6 cases over 16 days. (See, Rsp. App., Ex. E, 3). He, again, heard matters on 4 cases over 12 days. (See, Rsp. App., Ex. E, 11). Judge Fogan heard

a dependency case for 3 days. (Rsp. App., Ex. E, 12). Judge Williams, again, heard matters regarding 5 cases over 8 days. (Rsp. App., Ex. E, 16). Judge Futch heard matters concerning 2 cases during 2 days. (Rsp. App., Ex. E, 22). Judge Williams, again, heard matters regarding 5 cases over 13 days. (Rsp. App., Ex. E, 24). While the undersigned is unaware of the precise nature of this service, these documents do not appear to support the Petitioners assumption that senior judges are utilized for nothing other than, "'long trial' medical malpractice and other 'complex litigation' cases to the exclusion of all other cases." (Kahn Petition, 2).

PHP simply wishes this Court to prohibit any senior judge from hearing the trial in it's case, along with an injunction prohibiting any cases from being transferred, ". . . that fail to conform with the applicable Florida Constitutional provisions and this Court's Memorandum implementing them." (PHP Petition, 8).

It is respectfully submitted that the requested orders would appear to be unnecessary and, with regard to the PHP request, in the nature of an order simply requiring the Circuit to obey the law, in the absence of any significant indication that it intends not to do so or has failed to do so.

ARGUMENT

The utilization of senior judges through temporary assignments to handle lengthy cases or cases requiring particular expertise is not unconstitutional. Petitioners' position, essentially, is that the chief judges of the circuits must be prevented from assigning special categories of cases or lengthy cases to senior circuit court judges, whether or not this is the most efficient use of resources, and that such assignments are unconstitutional on a number of grounds. (See, Petitions). However, this conclusion does not appear to be mandated by the Constitution of Florida or the cases interpreting its relevant sections. See generally, Article V, Section 8, Florida Constitution; Rivkind v. Patterson, 672 So. 2d 819 (Fla. 1996); J.G. v. Holtzendorf, 669 So. 2d 1043 (Fla. 1996).

I. Necessity for Utilization of Senior Judges.

There is certainly no question that the utilization of senior judges is a vital and important resource to the judicial system of Florida. This Court has noted:

> The cost of the equivalent of a year of senior judge service is approximately 30 percent of the annual cost of a circuit judgeship.

In re Certification of the Need for Additional Judges, 688 So. 2d 321, 325 (Fla. 1997).

> The use of retired judges is the most cost effective and flexible program we have to address calendaring problems and emergencies as

they arise.

In re Certification of Judicial Manpower, 592 So. 2d 241, 246 (Fla. 1992); In re Certification of Judicial Manpower, 576 So. 2d 1303, 1307 (Fla. 1991).

> Florida trial courts have addressed workload pressures by relying heavily on the temporary assignment of retired judges. . . . We expect demand for retired judge service to continue to grow. . . . Requests by chief judges for the assignment of retired judges to hear such cases are expected to become routine.

In re Certification of Judicial Manpower, 558 So. 2d 1002, 1006 (Fla. 1990); In re Certification of Judicial Manpower, 540 So. 2d 820, 824-25 (Fla. 1989). See also In re Certification of the Need for Additional Judges, 728 So. 2d 730, 734 (Fla. 1999.

It would appear that retired judges are gold to the judicial system of Florida.

II. The Constitution of Florida.

The Constitution of the State of Florida does not preclude consecutive assignments of a retired judge to temporary duty. See generally, Rivkind v. Patterson, 672 So. 2d 819 (Fla. 1996); Wild v. Dozier, 672 So. 2d 16 (Fla. 1996); J.G. v. Holtzendorf, 669 So. 2d 1043 (Fla. 1996).

There are a number of constitutional provisions of relevance to the issues concerned herein:

> **SECTION 21. Access to courts.–**The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Article I, Section 21, Florida Constitution.

> (b) The chief justice of the supreme court shall be chosen by a majority of the members of the court; shall be the chief administrative officer of the judicial system; and shall have the power to assign justices or judges, including consenting retired justices or judges to temporary duty in any court for which the judge is qualified and to delegate to a chief judge of a judicial circuit the power to assign judges for duty in that respective circuit. (emphasis added).

Article V, Section 2 (b), Florida Constitution.

> **SECTION 7. Specialized divisions.–**All courts except the supreme court may sit in divisions as may be established by the general law. . . .

Article V, Section 7, Florida Constitution.

> **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. No justice or judge shall serve after attaining the age of seventy years except upon temporary assignment or to complete a term, one-half of which has been served. No person is eligible for the office of justice of the supreme court or judge of a district court of appeal unless the person is, and has been for the preceding ten years a member of the bar of Florida. . . .

Article V, Section 8, Florida Constitution.

> (b)(1) The election of circuit judges shall be preserved notwithstanding the provisions of subsection (a) unless a majority of those voting in the jurisdiction of that circuit approves a local option

> to select circuit judge by merit selection and retention rather than by election. The election of circuit judges shall be by a vote of the qualified electors within the territorial jurisdiction of the court.

Article V, Section 10(b)(1), Florida Constitution.

There are Rules of Judicial Administration which also have relevance:

> (a) The chief justice may, either upon request or when otherwise necessary for the prompt dispatch of business in the courts of this state, temporarily assign justices of the supreme court, judges of district courts of appeal, circuit judges, and judges of county courts to any court for which they are qualified to serve. Any consenting retired justice or judge may be assigned to judicial service and receive compensation as provided by law.
>
> (b) For the purpose of judicial administration, a "retired judge" is defined as a judge not engaged in the practice of law who has been a judicial officer of this state. a retired judge shall comply with all requirements that the supreme court deems necessary relating to the recall of retired judges.

Amendments to the Florida Rules of Judicial Administration, 682 So. 2d 89, 93 (Fla. 1996); See also, Rules 2.050(b)(2),(3), (4), (5), Fla. R. Jud. Admin.

III. Procedural Problems With Issues Raised by Petitioners.

There are a number of substantial procedural problems with regard to the contentions of the Petitioners.

First, the allegations regarding failure to meet the required definition of "retired" and the residency requirement (PHP Petition, 30-36) are premature.

Petitioners do not contend that they have been assigned a senior judge to try their case that is unqualified for these reasons nor have they presented any motion for disqualification on this ground. Therefore, they are improperly asking this court to test purely academic questions. See State ex rel. Rash v. Williams, 302 So. 2d 474, 475 (Fla. 3d DCA 1974); See also Bogue v. Fennelly, 705 So. 2d 575, 576 (Fla. 4th DCA 1997), review dismissed, 697 So. 2d 1215 (Fla. 1997); J.A. Jones Const. Co. v. State, Dept. of General Services, 356 So. 2d 863, 864 (Fla. 1st DCA 1978).

Second, with regard to the issues concerning alleged denial of the right to vote, including both denial of right of suffrage and residency, (PHP Petition, 13-21, 33-36) there is significant doubt as to the standing of litigants to raise the issues. They argue that they are entitled to assert the constitutional rights of the voters of Broward County because they are litigants. Thus, Petitioners raise the rights of qualified electors, not as qualified electors, but as parties to litigation. However, one may not, ordinarily, claim standing to vindicate the constitutional rights of third parties. See Barrows v. Jackson, 346 U.S. 249, 255, 73 S.Ct. 1031, 1034, 97 L.Ed.2d 1586 (1953); See also Higdon v. Metropolitan Dade County, 446 So. 2d 203, 207 (Fla. 3d DCA 1984).

Third, in would appear inappropriate to raise issues for the first time before the Supreme Court of Florida in a Petition for Prohibition. This Court set forth the

proper procedure for challenging the assignment of judges in Wild v. Dozier, 672 So. 2d 16 (Fla. 1996):

> Accordingly, we hold that a litigant who is affected by a judicial assignment made by a chief judge of a judicial circuit **must challenge the assignment in the trial court** and then seek review in this Court by way of petition for writ of prohibition or petition for relief under the "all writs" power. (Footnote omitted). See Art. V, § 3(b)(7), Fla. Const. (emphasis added).

Id. At 18.

Although the Petitioners did challenge the transfer of their case to the Senior Judges Docket in the trial court, they failed to raise a number of the issues that they have raised before this Court. (See, PHP App., 325-332; Kahn App., Exs. 4, 5, 6). The issues that delay equals denial of the constitutional right of access to the courts (Kahn Petition), that time standards for civil litigation are violated (Kahn Petition, 15-16), that the intent of the Medical Malpractice Reform Act is violated (Kahn Petition, 16-18), that the Senior Judge Docket is a division requiring the promulgation of a local rule (PHP Petition, 9-13), that an emergency of the public business is required before a senior judge can be assigned a case (PHP Petition, 21-30) and that senior judges which may be assigned the case do not meet the definition of “retired” (PHP Petition, 30-33) do not appear to have been fairly raised in the lower court. (See, PHP App., 325-332; Kahn App., Exs. 4, 5, 6). It is

submitted that the reason to require that the assignment be challenged in the lower court is to give that court an opportunity to rule on the issue concerned. Here, where a number of the issues concerned herein were not raised in the lower court, it is inappropriate to raise them for the first time before the Supreme Court of Florida. If preservation of the issue were not the objective of the requirement in Wild, it would be a useless requirement. Thus, it is analogous to the requirement for preservation of an issue for appeal. It is inappropriate to raise an issue for the first time on appeal. See Metropolitan Dade County v. Chase Federal Housing Corp., 737 So. 2d 494, 499, n. 7 (Fla. 1999); Dober v. Worrel, 401 So. 2d 1322, 1323-24 (Fla. 1981). It is submitted that, where there is a requirement that a judicial assignment be challenged in the trial court before raising it in this Court, that the reason for the challenge must be fairly presented before broaching the topic in the Florida Supreme Court.

Closely connected thereto is the issue of whether the Petitioners are actually challenging a judicial assignment, at all and which issues, if any, this Court has jurisdiction over. Generally, certiorari in the district court is the appropriate remedy to review an administrative order which allegedly exceeds the jurisdiction of the chief judge to issue. See State, Dept. of Juvenile Justice v. Soud, 685 So. 2d 1376, 1377 (Fla. 1st DCA 1997). However, "a litigant who is affected by a judicial

assignment made by a chief judge of a judicial circuit must challenge the assignment in the trial court and then seek review in this Court by way of petition for writ of prohibition or petition for relief under the 'all writs' power." (footnote omitted) Wild v. Dozier, 672 So. 2d 16, 18 (Fla. 1996). Therefore, this Court has jurisdiction over an administrative order entered by a chief judge which assigns judges. See Onwu v. State, 692 So. 2d 881, 882 (Fla. 1997). However, the category of issues which are reviewable by this Court pursuant to Wild is extremely limited:

> In Wild, this Court specifically referred to "judicial assignments," id., and "the administrative order assigning Judge Wild to circuit court duty." Id. at 18. The Court used these narrow terms rather than referring to "administrative orders" in general in order to avoid application of that decision to challenges to administrative orders such as the one at issue here. This was in recognition of the fact that challenges to administrative orders (other than those filed by a member of The Florida Bar or a judge seeking a determination by the Court's Local Rules Advisory Committee filed pursuant to Florida Rule of Judicial Administration 2.050(e)(2)) routinely have been made by petition for writ of common law certiorari in the district courts of appeal. See, e.g., Hewlett v. State, 661 So.2d 112 (Fla. 4th DCA 1995) (granting certiorari petition challenging administrative order as conflicting with statute and being beyond chief judge's authority); Valdez v. Chief Judge of the Eleventh Judicial Circuit, 640 So.2d 1164 (Fla. 3d DCA 1994) (granting certiorari petition challenging administrative order as exceeding chief judge's authority), review denied, 652 So.2d 816 (Fla.1995); Department of Health & Rehab. Servs. v. Johnson, 504 So.2d 423 (Fla. 5th DCA 1987) (denying certiorari petition challenging administrative order as an attempt to legislate). Although the First District Court in this case and the

> Second District Court, in Mann v. Chief Judge of the Thirteenth Judicial Circuit, 693 So.2d 117 (Fla. 2d DCA), (footnote omitted) on certification, 696 So.2d 1184 (Fla.1997), have read the Wild decision as abolishing this long-standing mechanism for challenging routine administrative orders, (footnote omitted) such was not this Court's intent. In fact, in Mann v. Chief Judge of the Thirteenth Judicial Circuit, 696 So.2d 1184 (Fla.1997), this Court declined the opportunity to extend its holding in Wild.

1-888-Traffic Schools v. Chief Circuit Judge, Fourth Judicial Circuit, 734 So.2d 413, 415 (Fla. 1999).

Administrative Order No. I-92-J-1 sets forth a procedure for requesting assignment of a senior judge, but does not make any such assignment. (See, PHP App., 6). There are administrative orders assigning senior judges (See, PHP App., 40-176), but the Petitioners do not appear to be challenging any of them. (See, PHP Petition 2-3; Kahn Petition, 2). There are also orders which set, or may set, the lower court case on the Senior Judges Docket for trial, although they do not assign any specific judge (See, PHP App., 34, 323-24, 333). Therefore, Administrative Order I-92-J-1 would appear not to be reviewable by this Court at this time, assignment orders which do not assign the lower court case would appear not to be reviewable in this case and orders setting trial may or may not be reviewable, depending on the determination of this Court as to whether they are "administrative orders" and whether they make "judicial assignments." See 1-888-

Traffic Schools at 415. Whatever the determination of this Court on those issues, it is respectfully submitted that the Court ought to review only those issues raised by a reviewable order and in which the Petitioners are actual parties at interest. See generally Reinish v. Clark, 765 So. 2d 197, 202 (Fla. 1st DCA 2000), review dismissed, 773 So. 2d 54 (Fla. 2000). Indeed, the issues concerned herein may more appropriately be dealt with, at least initially, by the Committee of Appointment and Assignment of Senior Judges established by Administrative Order No. AOSC01-25 of this Court.

There is also the possibility of waiver with regard to all of the issues concerned herein. Petitioners first raised the propriety of the assignment to the Senior Judges Docket on or about July 24, 2000, approximately two weeks after the assignment concerned. (See, Kahn App., Ex. 4, PHP App., 325-326). It was denied on November 13, 2000 (See, Kahn App., Ex. 8). Petitioners then waited until September, 2001 to file their Petitions for Prohibition. (See, PHP Petition, 37; Kahn Petition, 21). Although the undersigned is unaware of any specific time limit for the filing of the petition for prohibition. A delay of close to a year after the rendering of the order to be reviewed seems excessive and, it is respectfully submitted, could well constitute waiver. Additionally, as to any matters which should have been raised by certiorari, the Petitions are untimely. See Rule 9.100(c),

Fla. R. App. P.; State, Dept. of Juvenile Justice v. Soud, 685 So. 2d 1376, 1377 (Fla. 1st DCA 1997).

IV. Issues Raised by Petitioners.

A. ACCESS TO THE COURTS IS NOT DENIED BY THE SENIOR JUDGES DOCKET.

It is the position of the Seventeenth Circuit that access to the courts of Florida is not unconstitutionally denied by permitting circuit court judges, with the approval of the Administrative Judge, to transfer long duration civil trials to senior judges for trial purposes.

The essential position of the Petitioners appears to be that the Chief Judge should be prohibited from allowing long duration civil trials to be assigned to senior judges (who expand the number of judges available to hear such trials) because, inferentially, this delays getting to trial on such cases. (See, Khan's Petition). This appears analogous to contending that we need fewer taxi drivers because it takes too long to get a cab. In other words, it is counterintuitive, at the very least.

It is possible, although it does not appear to be supported by the record or appendix, that long cases could suffer a greater delay than they otherwise would due to utilization of senior judges for such matters. However, the fact that the Seventeenth Circuit has the highest rate of jury trials per judge of any circuit in the

state, over 70% above the state average (See, Rsp. App., Ex. F, p. 23; Ex. G, p. 23), would tend to indicate otherwise.

It would also appear to be relevant, although not mentioned by the Kahn petitioners, that the docket indicates that one or more of the Petitioners moved for a continuance, apparently contributing to the delay that they infer denies access to the courts. (Ex. H, p. 11, entry for Mar. 21, 01).

The Kahn Petitioners, although they so allege, have been unable to refer to a single authority in which a delay analogous to that in this case has been held to be a denial of access to the courts or of due process. They seem to have good company regarding this failure to discover supporting authorities. The United States Ninth Circuit has stated, "[n]otwithstanding the fundamental rights of access to the courts, the Bar Association does not cite, nor has our independent research revealed, any decision recognizing a right to judicial determination of a civil claim within a prescribed period of time as an element of such right." Los Angeles County Bar Association v. EU, 979 F.2d 697, 706 (9th Cir. 1992). Indeed, Petitioners' appendices seems to be bare of any indication that any delay, at all, could be attributable to the transfer of the case to the Senior Judges Docket. (See, Kahn App.).

Although there is a dearth of cases on court procedural requirements

constituting delay sufficient to amount to denial of access [4] there would appear to be at least some analogy to constitutional speedy trial requirements in criminal cases. That is, it would seem axiomatic that a delay severe enough to be deemed to deny access to courts, at all, would seem to have to be greater than the delay required to deny a speedy trial. Thus, it is relevant that, in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the United States Supreme Court held that a defendant's Sixth Amendment right to a speedy trial was not violated even though more than four years of delay was attributable to the prosecution. The factors to be considered in determining if the right to a speedy trial has been denied are the length of the delay, the reason for the delay, the defendant's assertion of the right and the prejudice to the defendant. Id. at 530, 2192. Barker v. Wingo has been cited with approval by this Court in Butterworth In and For Broward County v. Fluellen, 389 So. 2d 968, 970 (Fla. 1980). It is respectfully submitted that, were the Petitioners criminal defendants rather than civil, it appears that they would have failed to meet the burden required to establish denial of the constitutional right to speedy trial. If so, they certainly have failed to establish denial of constitutionally

[4] But See Alexander v. Cox, 348 F.2d 894 (5th Cir. 1965) (where petitioners were attempting to remove 400 criminal causes relating to arrests made at the same location on the same day for the same offense, requiring separate petitions for each such case would be so burdensome as to deny access to federal courts except after an onerous delay).

required access to the courts.

In another analogous situation, it has been held that the delay inherent in requiring prison inmates to exhaust administrative remedies prior to instituting a federal civil rights action under 42 U.S.C. § 1983 does not deny inmates access to federal court within the meaning of the constitution. See Martin v. Catalanotto, 895 F.2d 1040, 1042 (5th Cir. 1990). Similarly, in an action alleging denial of access to a lawyer, library, other materials and the courts during an inmate's period in administrative confinement, the Eleventh Circuit had the following to say:

> In *Bounds v. Smith*, 430 U.S. 817, 825, 97 S.Ct. 1491, 1496, 52 L.Ed.2d 72 (1977), the Supreme Court held that prisoners were entitled to 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." Many circuits have understood *Bounds* to require some showing of prejudice or injury, that is, some showing of actual denial of access, to support such a claim.

Chandler v. Baird, 926 F.2d 1057, 1062 (11th Cir. 1991).

Indeed, the United States Supreme Court, in an access to courts case, referred to an actual-injury requirement as a, "constitutional prerequisite." Lewis v. Casey, 518 U.S. 343,351, 116 S.Ct. 2174, 2180, 135 L.Ed.2d 606 (1996). Further, the court quoted with approval the statement from Bounds v. Smith stating, "'we encourage local experimentation' in various methods of assuring access to the courts." Id. at 352, 2180. It appears that it is precisely such local experimentation to improve

access to the courts that resulted in the Senior Judges Docket.

In another inmate case, the court stated, "[w]hile it is clearly impermissible to obstruct a prisoner's physical access to the courts, or to take actions that effectively deny court access, it is not constitutionally repugnant to require an indigent civil litigant to comply with rules necessary to facilitate the functioning of the justice system." Hodge v. Prince, 730 F. Supp. 747, 751 (N.D. Tex. 1990), affirmed, 923 F.2d 853 (5th Cir. 1991), aff'd, 923 F.2d 853 (5th Cir. 1991). It is respectfully submitted that, where this Court has determined that the utilization of senior judges for long duration civil trials that would otherwise be disruptive of civil calendars is desirable (See, Rsp. App., Ex. B) and may well be necessary to facilitate the functioning of the system of justice, [5] it is not constitutionally repugnant to require litigants to comply with the orders and procedures promulgated in order to provide for such utilization.

The Kahn Petitioners' contention that this Court intends to discourage the utilization of senior judges for lengthy trials (Kahn Petition, 12-13) flies in the face of this Court's express indication that senior judges should be utilized for, "long duration civil trials that would otherwise be disruptive of civil calendars." (Rsp.

[5] See In re Certification of Judicial Manpower, 592 So. 2d 241, 246 (Fla. 1992); In re Certification of Judicial Manpower, 576 So. 2d 1303, 1307 (Fla. 1991); In re Certification of Judicial Manpower, 558 So. 2d 1002, 1006 (Fla. 1990).

App., Ex. B). It is respectfully submitted that it appears obvious that this Court does not consider, "complex" and "lengthy duration" to be equivalent terms, nor does it intend to discourage using senior judges for long duration trials.

The Kahn Petitioners' inference that exceeding an 18-month filing-to-final disposition time is unconstitutional (Kahn Petition, 15-16) and their contention that delay in medical malpractice cases is violative of the legislative intent underlying the Medical Malpractice Reform Act (Kahn Petition, 16-18) are simply nonissues. There is no authority to support the former and the latter is irrelevant, where it is not contended or established that any statutes are violated by the utilization of senior judges for long duration cases. We would all like to see cases disposed of more quickly, but limitations of resources require that Chief Judges be given the freedom to manage their resources in the manner designed to provide the best system of justice to the most people as reasonably as possible. See Rule 2.050(b), Fla. R. Jud. Admin. It appears that the Seventeenth Circuit is doing a fine job of doing precisely that. (See, Rsp. App., Ex. F, G).

There is no indication that Petitioners have been denied their constitutional right of access to the courts.

B. THE SENIOR JUDGES DOCKET IS NOT A DIVISION FOR CONSTITUTIONAL PURPOSES.

The creation of a separate docket which may, but not must, be utilized by circuit court judges in the civil division, for civil trials expected to take three weeks or more, which is staffed by senior judges, [6] is not unconstitutional.

Mann v. Chief Judge of the Thirteenth Judicial Circuit, 696 So. 2d 1184 (Fla. 1997) is certainly relevant to this issue. The Chief Judge, in that case, had created a drug division of the criminal court by order, rather than by local rule. This Court had the following to say:

> The petitioners contend that the drug division could only be established by local rule approved by this Court in accordance with article V, section 20(c)(10) of the Florida Constitution. To the contrary, we conclude that the drug division was properly created by administrative order. Despite its characterization as a division, we find that the drug court is more properly viewed as a specialized section or subdivision of the criminal division of the circuit court. See Administrative Order, Fourth Judicial Circuit (Division of Courts), 378 So.2d 286, 286 (Fla.1979) ("[S]ection 20(c)(10) of article V only requires the establishment of subject matter divisions, i.e., criminal, civil, juvenile, probate, and traffic...."). To require every specialized section of the major subject-matter divisions of a court to be approved by local rule would place too great a burden upon the efficient administration of justice.

Mann v. Chief Judge of the Thirteenth Judicial Circuit, 696 So.2d 1184 (Fla. 1997).

PHP contends that Mann can be distinguished from this case because the

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[6] It should be noted that, the undersigned is informed that cases are not reassigned from the original judge, but simply set for trial before the Senior Judges Docket and, if not reached, it goes back to the original judge.

drug division, "was staffed by active (elected) circuit court judges." (PHP Petition, 10). Thus, according to the PHP, what constitutes a division of a circuit court depends, not upon what it does or where it is, but who is in it. Therefore, according PHP's analysis, if one active, elected judge were moved into the senior judge docket group of judges and it were re-named, "long duration civil trial docket", it would be a subdivision and not a division and would be perfectly acceptable. On the other hand, if it were staffed solely with judges who had been appointed by the Governor, but who had not yet been elected, then it would be a division and would be unconstitutional. It is respectfully submitted that such an analysis, in which the constitutional definition of what is a "division" turns on who is in it, is fallacious.

Forseeably, if PHP's analysis is correct, the Courts of this state have been operating on erroneous assumptions. As PHP has admitted, Robertson v. State, 719 So. 2d 371 (Fla. 4th DCA 1998) specifically found that a criminal defendant was properly tried by "Division FS," a criminal court section of the Seventeenth Circuit presided over exclusively by senior judges, which was created by administrative order rather than by local rule. (PHP Petition, 10, n. 6). See also Heaton v. State, 711 So. 2d 1157 (Fla. 4th DCA (1998) (finding that habitual offender division and career criminal division were specialized subdivisions of

circuit court which could be created by administrative order). PHP deals with that problem by simply stating that Robertson was wrongly decided. Similarly, it admist that, were that analysis correct, this Court would have been required to grant the Petition for Writ of Prohibition that it denied in Brown & Williamson Tobacco Corporation v. Schneider, 705 So. 2d 7 (Fla. 1997) (admittedly, without opinion). (PHP Petition, 11, n. 7). PHP simply asks this Court to reexamine that case in light of their arguments.

Thus, according to the PHP, Judges Polen, Stevenson and Taylor of the Fourth District were wrong on this issue and this Court didn't understand the situation.

Petitioner relies exclusively on the specially concurring opinion of Judge Farmer in Williams v. State, 596 So. 2d 791 (Fla. 4th DCA 1992). Judge Farmer's concern was that a rotation of county court judges were presiding over a "division" of the circuit court sitting in the Glades district of Palm Beach, the rotation being an attempt to avoid Payret v. Adams, 500 So. 2d 136 (Fla. 1986). Indeed, Judge Farmer informed us of his purpose as follows, "[m]y only purpose in commenting on the subject is to alert the Chief Judge of the Fifteenth Judicial Circuit that at least one judge in the little, red-brick building across town perceives a problem in his imaginative use of county judges to create an additional circuit judge that the

legislature has declined to give him." Williams at 792. Payret, of course, was a case in which divisions not created by local rule was never an issue, at all. Instead, it concerned a county court judge who was permanently assigned to hear all circuit court cases in the Glades district. According to this Court, in that case, "[t]he sole issue before us sub judice is the temporal nature of respondent's assignment." (emphasis added). Payret at 138. It was determined that the assignment of the county court judge as a circuit court judge was permanent, rather than temporary, and was, therefore, unconstitutional. Id. at 139. Neither Payret nor Williams even mention the problem of a division not created by local rule, the issue which they are relied upon to support.

It is respectfully submitted that, based on the above, there is no constitutional prohibition under. Article V, section 7 of the Florida Constitution to creating a section to hear long duration civil trials that would otherwise be disruptive of civil calendars, whether it is called a senior judges docket, a long duration trial section or something else and whether it is staffed by senior judges, judges appointed by the Governor or active judges.

C. THE ELECTORS' CONSTITUTIONAL RIGHT OF SUFFRAGE IS NOT IMPINGED UPON BY THE SENIOR JUDGES DOCKET.

Where the Constitution of Florida specifically grants the power to the Chief

Justice of the Florida Supreme Court to assign retired justices or judges to temporary duty in any court for which they are qualified [Article V, Section 2(b)], it is not a constitutional impingement on the right to elect judges for the Chief Justice to exercise this power, as he or she sees fit. Nor is it such an infringement to permit the chief judges of the various circuits to utilize these assigned retired justices or judges as necessary, within their discretion.

Petitioner relies upon the prior version ofArticle V, Section 10(b) of the Constitution, which provided that circuit judges, "shall be elected." (PHP Petition, 15). This, of course, has subsequently been superceded by a provision permitting merit selection and retention, at the option of the electors. However, within the Seventeenth Circuit, election of judges has been retained, in which case the Constitution provides that, "[t]he election of circuit judges shall be by a vote of the qualified electors within the territorial jurisdiction of the court." Article V, Section 10(b)(1), Florida Constitution. Thus, the power to elect circuit court judges, in general, has been preserved in the Constitution.[7]

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[7] It should be noted that PHP contends that the importance of the right to vote is so the official knows, "that person is chosen by the electors to represent them and express their views." (PHP Petition, 19) (quoting Justice Boyd's specially concurring opinion in In re Apportionment, 414 So. 2d 1040, 1053 (Fla. 1982). However, as pointed out by Judge Webster, "judges do not, and should not have a constituency. They do not represent anyone. (footnote omitted). Rather, they represent the law." Peter D. Webster, Selection and Retention of Judges: Is

PHP, however, spends eight (8) pages of its Petition informing us of how important the right to vote is. (PHP Petition, 13-21). This would appear to be self evident and, essentially, irrelevant, but PHP then uses this to contend that it quashes the Constitutional power of the Chief Justice to assign senior judges to duty unless there is declared, "an emergency of the public business." (PHP Petition, 21).

Also, it should be noted that this precise issue, albeit in a criminal context was raised before this Court in John House v. State, Case No. SC01-768, in which a Petition for Writ of Prohibition and/or Petition for Review of Administrative Order was denied without opinion. House v. State, Case No. SC01-768 (Fla. May 2, 2001).

D. NO EMERGENCY IS REQUIRED FOR THE CHIEF JUSTICE TO EXERCISE THE CONSTITUTIONAL POWER OF APPOINTMENT.

Where the Florida Constitution does not qualify the power of the Chief Justice to assign retired justices or judges to temporary duty, it would be inappropriate to insert "only in the case of an emergency of the public business" as an additional limitation on the power. See, Article V, Section 2(b), Florida Constitution.

There One "Best" Method? 23 Fla. St. U.S. Rev. 1, 10 (1995).

The sole basis for the Kahn Petitioners' contention that neither the Chief Justice nor the Chief Judge may assign a retired judge to a case unless an, "emergency of the public business" has been declared (Kahn Petition, 21-30) is the following language from Spector v. Glisson, 305 So. 2d 777 (Fla. 1974):

> **It has been said** that the only excuse for the appointment of any officer made elective under the law is founded on the emergency of the public business and that when an elective office is made vacant the policy of the law is to give the people a chance to fill it as soon as possible. . . .(citations omitted) (emphasis added).

Id. at 781.

Thus, Petitioners assume that, if this Court says, in an opinion that, "it has been said," whatever follows is the law of this state. (See, PHP Petition, 21). Thus, when the Fourth District found that, "[i]t has been said that no other type of fish has as devout a following as snook . . . .", it became the law. See Quevedo v. South Florida Water Management Dist., 762 So. 2d 982, 984, n. 1 (Fla. 4th DCA 2000); See also State v. Green, 355 So. 2d 789, 790 (Fla. 1978) (". . . it has been said that originally insanity was not a defense in the courts . . . ."). PHP's assumption does not appear to be a reasonable one. It is respectfully submitted, especially when the quote from Spector is considered in context, that no "emergency of the public business" is required to be declared by either the Governor (whose power of appointment was discussed in the case) or the Chief

Justice (which was not) before exercising their respective powers of appointment.

The Petitioner's interpretation, that there is an unstated limitation of the Constitutional power of the Chief Justice to appoint (PHP Petition, 21-30) would nullify that constitutional power except under specific circumstances. Thus, it essentially ignores the requirement that, "[a] constitutional provision is to be construed in such a manner as to make it meaningful. A construction that nullifies a specific clause will not be given unless absolutely required by the context." Plante v. Smathers, 372 So. 2d 933, 936 (Fla. 1979); Gray v. Bryant, 125 So. 2d 846 (Fla. 1960); See also Chiles v. Phelps, 714 So. 2d 453, 459 (Fla. 1998). Plante also recommends that common sense be used to determine the intent of a constitutional provision. Id. at 936. It is submitted that it is more likely that the intent of the provision concerned was to permit the Chief Justice to deal with the necessities of judicial management from a proactive position rather than being required to wait until an emergency exists before utilizing the power of appointment (and allowing the Chief Judges of the various circuits to use their power of assignment).

Indeed, Rivkind v. Patterson, 672 So. 2d 819 (Fla. 1996), cited by the Petitioner (PHP Petition, 22, n. 10), which concerned the same constitutional provision concerned herein, more strongly supports the Seventeenth Circuit's position than Petitioner's. It found that the exclusive and perpetual monthly

assignment, continuing over several years, of county court judges to hear all petitions for permanent and temporary injunctions in the domestic violence department of the family division of the Eleventh Circuit to, ". . . constitute a logical and lawful means to ensure the expeditious and efficient resolution of domestic violence issues in the Eleventh Circuit." Id. at 821. It does note that, "[w]e have previously recognized 'the extreme importance of having domestic violence issues addressed in an expeditious, efficient, and deliberate manner.'" Id. at 820. Therefore, it appears likely that, if the assignment of judges (retired or county to circuit) constitutes an expeditious and efficient means of addressing important issues [such as ensuring the timely dispensation of justice, discussed by the Kahn Petitioners], then sufficient justification exists to support the power of appointment of the Chief Justice and the assignment of retired judges by the chief judges. In another case concerning the same constitutional provision, this Court held:

> Nonetheless, as we stated in *Crusoe* [8] and recently reiterated in *Wild*, [9] a county court judge may be assigned to hear circuit court work on a temporary, regular basis, provided the assignment is directed to a specified, limited class of cases, is used to maximize the efficient administration of justice, and requires the county judges to supplement and aid the circuit judges rather than to replace them.

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[8]Crusoe v. Rowls, 472 So. 2d 1163 (Fla. 1985).

[9]Wild v. Dozier, 672 So. 2d 16 (Fla. 1996).

Holsman v. Cohen, 667 So. 2d 769, 771 (Fla. 1996).

Thus, the standard this Court has traditionally used to support temporary appointment appears to be, "to maximize the efficient administration of justice," not, "to alleviate an emergency of the public business."

It is also relevant to note that this Court has held that adding qualifications to a position in addition to those required by the Constitution is, itself, unconstitutional. See State v. Grassi, 532 So. 2d 1055 (Fla. 1988). It is submitted that adding limitations to a power granted by the Constitution, as PHP urges, is equally inappropriate.

It should be noted that there is no appendix citation in support of the statement that, ". . . . there is a standing practice of routinely transferring complex cases to the senior judges docket." (PHP Petition, 22). The Seventeenth Circuit refers this Court to the appendix to this response regarding that issue, which includes actual dockets of judges of the Seventeenth Circuit which undermine this unsupported contention. (See, Rsp. App., Exs. D, E).

However, even if all of the above were untrue, and an emergency of the public business was a precondition to the exercise of the appointment power concerned, it is respectfully submitted that the finding of such a situation would have to be found implicit in the exercise of the appointment power, itself. There is

no basis for a two-tier system requiring an emergency be declared before the Governor, the official most concerned in the Spector case, appoints to fill a judicial vacancy. No authority requires that he, first, declare a state of emergency and then promulgate his appointment. If an emergency is required, at all, then the Governor implicitly finds such a situation when he or she appoints. By the same token, the Chief Justice, if an emergency is required, implicitly finds such a situation when the order of assignment (See Rsp. App., Ex. A) is issued. Given the previously noted importance of senior judges to the administration of justice in this state, there would certainly be an emergency of the public business if they were not assigned by this Court and utilized by the chief judges. See In re Certification of Judicial Manpower, 576 So. 2d 1303, 1307 (Fla. 1991); In re Certification of Judicial Manpower, 592 So. 2d 241, 246 (Fla. 1992); In re Certification of Judicial Manpower, 558 So. 2d 1002, 1006 (Fla. 1990).

No emergency of the public business is required before the Chief Justice may exercise the power to appoint senior judges or the Chief Judges may assign them in such a manner as to maximize the efficient administration of justice, which is precisely what appears to be happening in the Seventeenth Circuit. (See, Rsp. App., Exs. F, G). However, if there is, then the necessary finding is implicit to their assignments which are clearly necessary to the timely administration of justice in

this state and in this circuit.

E. THIS COURT HAS NOT APPOINTED UNQUALIFIED SENIOR JUDGES.

This Court his assigned certain senior judges to serve as temporary judges for a specific period of time. (See, Rsp. App., Ex. A). PHP contends that, these, ". . . include persons who are not qualified under the constitution because they do not meet the constitutional definition of the term "retired" . . ." (PHP Petition, 3,). They have failed to note which judges they are referring to and what qualifications they fail to meet. (See, PHP Petition, 3, 30-33).

First, it is respectfully submitted that the Chief Justice, not the Petitioners, determine whether senior judges are qualified to be assigned to such temporary duty. (See, Ex. A). Presumably, the Chief Justice has done so before exercising the power of appointment concerned herein. However, even if that were not the case, the appropriate remedy would not to be to prohibit every senior judge in the Seventeenth Circuit from hearing the case concerned herein.

Therefore, with regard to this issue, the Petitioners are premature. Petitioners do not contend that they have been assigned a senior judge to try their case that is unqualified for this reason. Further, they have not presented any motion for disqualification on this ground. Therefore, they are improperly asking this court to

test some unspecified constitutional question, which has never been presented to the lower Court, in advance. This is improper. See State ex rel. Rash v. Williams, 302 So. 2d 474, 475 (Fla. 3d DCA 1974); See also Bogue v. Fennelly, 705 So. 2d 575, 576 (Fla. 4th DCA 1997); J.A. Jones Const. Co. v. State, Dept. of General Services, 356 So. 2d 863, 864 (Fla. 1st DCA 1978).

Further, but related thereto, ". . . . Florida recognizes a general standing requirement in the sense that every case must involve a real controversy as to the issue or issues presented. See Interlachen Lakes Estates, Inc. V. Brooks, 341 So. 2d 993 (Fla. 1976)." Department of Revenue v. Kuhnlein, 646 So. 2d 717, 720-21 (Fla. 1994), cert. denied, 515 U.S. 1158, 115 S.Ct. 2608, 132 L.Ed.2d 853 (1995). Stated otherwise, in the analogous situation of declaratory relief:

> Before any proceeding for declaratory relief should be entertained it should be clearly made to appear that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interests are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answers propounded from curiosity. These elements are necessary as being judicial in nature and therefore within the constitutional powers of the courts. May v. Holley, 59 So.2d 636, 639 (Fla.1952); Martinez v. Scanlan,

582 So.2d 1167 (Fla.1991).

Reinish v. Clark, 765 So.2d 197, 202-3(Fla. 1st DCA 2000).

It is certainly true that this Court has held that:

> it is the opinion of this court that former active judges of all courts below the level of circuit judges who have retired pursuant to the laws of Florida providing retirement compensation and who are receiving compensation thereunder, are retired judges within the contemplation of Section 2, Article V of the State Constitution.
>
> Therefore, it is ordered that, pursuant to Section 2, Article V, Florida Constitution, such retired judges, with their consent, may be assigned by the Chief Justice of the Supreme Court of Florida to judicial service in any court of the same jurisdiction in which they formerly served as active judges and also in any court of lesser jurisdiction to that in which they formerly served as active judges, except municipal courts; provided, they can comply with and meet all applicable requirements prescribed for retired judges set forth in the order entitled: In re: Rules Governing Assignment to Duty of Retired Justices and Judges' filed June 24, 1970, and reported in 236 So.2d 769--770 (Fla.).

In re: Rules Governing Assignment to Duty of Retired Justices and Judges, 239 So.2d 254 (Fla. 1970). It is also true, of course, that, [f]or the purpose of judicial administration, a 'retired judge' is defined as a judge not engaged in the practice of law who has been a judicial officer of this state." Rule 2.030(a)(3)(B), Fla. R. Jud. Admin.

It should be noted that certain statutes relied upon by PHP to support this argument, §§ 25.101, 25.112 and 123.04(1), Florida Statutes (1995) (See PHP

Petition, 32) were repealed effective May 30, 1997 by c. 97-180 § 20 Laws of Florida.

Otherwise, however, the undersigned is unable to respond to this issue where no unqualified judge has been named and Petitioner PHP has been unwilling to set forth what qualifications such judge has failed to meet.

It is respectfully submitted that the Court should not rule regarding this issue where it is academic, raised prematurely and where invalid authorities have been relied upon in support of it.

F. SENIOR JUDGES MAY BE PERMITTED TO SERVE OUTSIDE OF THEIR COUNTY OF RESIDENCE.

Petitioners first problem regarding this issue, is that they have, once again, raised it prematurely. There is no allegation that a senior judge unqualified for this reason has been assigned to the Petitioners' case and no motion for disqualification has been brought on such a basis. Therefore, although they did raise this issue below. (See Kahn App., Ex. 6, 6-9), they raised it before it was an issue. Once again, the Petitioners desire this Court to answer an academic question.

However, that is not the Petitioners' only problem. This Court has spoken on the issue:

> Therefore, it is hereby ordered that, pursuant to Article V,

> Section 2, of the Florida Constitution and the rules of ths Court, **retired Justices of the Supreme Court, retired Judges of the District Courts of Appeal and retired Judges of the Circuit Courts, with their consent, may be assigned by the Chief Justice of the Supreme Court of Florida to judicial service in any court,** except municipal courts, in this State. (emphasis added).

In re, Assignments of Justices and Judges, 222 So. 2d 22, 23 (Fla. 1969).

Although this case was decided under a prior version of the Florida Constitution which did not contain the "qualified" language, that is essentially irrelevant where, both prior to and subsequent to the 1972 Constitutional revision, Judges have been constitutionally permitted to preside over courts outside the jurisdiction that they were elected in or reside in. See Rule 2.050(b)(4), Fla. R. Jud. Admin.; Card v. State, 497 So. 2d 1169, 1173 (Fla. 1986), cert. denied, 481 U.S. 1059 (1987); State ex rel. Dato v. Himes, 184 So. 648 (Fla. 1938); Judges of Polk County Court by Herring v. Ernst, 615 So. 2d 276, 277 (Fla. 2d DCA 1993), review denied, 624 So. 2d 265 (Fla. 1993); State v. Erber, 560 So. 2d 1255 (Fla. 5th DCA 1990). Indeed, there is a specific rule of judicial administration which, according to the Petitioners' analysis on this issue, would authorize an unconstitutional assignment procedure. See Rule 2.050(b)(4), Fla. R. Jud.. Admin., (PHP Petition, 33). Also, it should be noted that this precise issue, albeit in a criminal context was raised before this Court in John House v. State, Case No. SC01-768, in which a Petition for Writ

of Prohibition and/or Petition for Review of Administrative Order was denied without opinion. House v. State, Case No. SC01-768 (Fla. May 2, 2001).

The reason the rule and the procedure allegedly followed in the Seventeenth Circuit is not unconstitutional is obvious. The Constitution simply uses different words to mean different things. Article V, Section 8, upon which Petitioners rely, says, "[n]o person shall be **eligible** for office of justice or judge . . .". (emphasis added). The word, "eligible" appears in that section five (5) times. The word, "qualified" does not appear, at all. Article V, Section 8, Florida Constitution. An examination of Section 2(b) provides an interesting contrast, "[t]he chief justice of the supreme court . . . shall have the power to assign justices or judges, including consenting retired justices or judges, to temporary duty in any court for which the judge is **qualified** . . .". (emphasis added). The word "eligible" does not appear in that section. Article V, Section 2(b), Florida Constitution,. The Petitioners assume that eligible for office and qualified to be assigned are equivalent phrases. However, the law does not support such an interpretation.

It is axiomatic that the rules used in construing statutes are generally applicable to construing the provisions of a Constitution. See State ex rel. McKay v. Keller, 191 So. 542 (Fla. 1939). It is equally axiomatic, and a rule of statutory construction, that the use of different terms in different portions of the same statute

is strong evidence that different meanings were intended. See State v. Mark Marks, P.A., 698 So. 2d 533, 541 (Fla. 1997); Clarke v. Schimmel. 774 So. 2d 7, 9 (Fla. 2d DCA 2000). Therefore, when different terms are used in different sections of the same constitutional article, a similar rule of construction is applicable. It is submitted that the electorate uses "qualified" and "eligible" to mean different things. Eligible, in this case, refers to eligibility to take office. Qualified designates the specific qualifications of the person to hear the kind of case being assigned to them. The former includes residence. The latter does not.

Petitioners' reliance on Brown v. State, 526 So. 2d 903, 905 n. 8 (Fla. 1988), abrogated on other grounds, Fenelon v. State, 594 So. 2d 292, 294 (Fla. 1992) and Treadwell v. Hall, 274 So. 2d 537, 538 (Fla. 1973) (PHP Petition, 33) to support their "eligible" means "qualified" theory is misplaced. Neither concerned residency, but only the requirement that county judges who had not yet been members of the bar for five years, should not be eligible for appointment to the circuit bench. Neither even discussed the issue of whether the appointment of a judge with less than five years as a bar member would be unconstitutional, since such discussion would have been totally academic, given the experience of the judges concerned in Brown and Treadwell. Petitioners, thus, rely solely upon dicta to argue that a rule of judicial administration, and caselaw, set forth an

unconstitutional rule of law. (PHP Petition, 33-35).

Petitioners' attack on the residency of senior judges is premature, is academic and is incorrect, based both upon rules of constitutional construction and the cases of this Court.

CONCLUSION

There is significant doubt as to whether a number, or possibly all of the issues raised by the Petitioners are properly before this Court. In any event, the Petitioners have failed to show that the power of the Chief Justice to assign senior judges to the Seventeenth Circuit and the ability of the Chief Judge to the Circuit to utilize them, as he has, in a manner designed to maximize the judicial efficiency of the Circuit are unconstitutional. Accordingly, the Petitions for Writ of Prohibition and for Exercise of the Court's "All Writs" Authority concerned herein should be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE and attached APPENDIX were furnished by mail to the following on this ___th day of November, 2001.

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CERTIFICATE OF COMPLIANCE

The undersigned, pursuant to Rule 9.100(l), Fla. R. App. P., hereby certifies that this Response is computer-generated in Times New Roman, 14 point.

IN THE SUPREME COURT
STATE OF FLORIDA
CASE NOS. SC01-2062, SC01-2079

PHYSICIANS HEALTHCARE
PLANS, INC., ET AL.

Defendants/Petitioners,

v.

RAYMOND PFEIFLER, ET UX.

Plaintiffs/Respondents.
_____/ L.T. Case No. 98-013485

KHURSHID KAHN, M.D., ET AL.

Defendants/Petitioners,

v.

RAYMOND PFEIFLER, ET UX,

Plaintiffs/Respondents.
_____/

APPENDIX TO RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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