

IN THE SUPREME COURT OF FLORIDA

**IN RE: ADVISORY OPINION TO THE)
 GOVERNOR REGARDING)
 APPOINTMENT OR ELECTION)
 OF JUDGES.)**

Case No. SC02-1213

**ON PETITION OF THE GOVERNOR
FOR AN ADVISORY OPINION**

**ANSWER BRIEF OF INTERESTED PARTY,
CARLOS A. PAZOS**

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INTERESTED PARTY

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PRELIMINARY STATEMENT

The undersigned Interested Party, Carlos A. Pazos ("Pazos"), has been qualified by Secretary of State Katherine Harris as a candidate for the judgeship designated as Group 30 of the Thirteenth Judicial Circuit of the State of Florida. *See*, Governor's May 31, 2002 Request for Advisory Opinion at ¶3. To avoid needless duplication and to maximize judicial economy, Pazos hereby joins in and adopts the Brief of Interested Party, Candidate, Kenneth C. Whalen ("Whalen"). The facts and arguments presented below are in addition to those presented in Whalen's Brief.

STATEMENT OF CASE AND FACTS

Pazos joins in and adopts the Statement of Case and Facts contained in Whalen's Brief, and submits the following additional matters:

As noted by the Governor, Pazos and the other candidates for the subject judgeship were qualified by the Department of State during the period between May 13 and 17, 2002. *See*, Governor's May 31, 2002 Request for Advisory Opinion at ¶3. Circuit Judge Florence Foster's involuntary retirement became effective thereafter, on midnight of May 30, 2002. *See*, Governor's May 31, 2002 Request for Advisory Opinion at ¶1. Before Judge Foster's involuntary retirement became effective, Pazos and the other candidates for the subject judgeship paid qualifying fees in the amount of \$5,200.00 each, in accordance with section 105.031(3), Florida Statutes, and have incurred other expenses in connection with their respective campaigns. For example, in addition to the qualifying fees, Pazos has expended in excess of \$12,152.22 in connection with his campaign (App. "A").

The Governor states that he expects to fill Judge Foster's office by September 2002, and that if no appointment is made, that office will not be filled until January 2003. *See*, Governor's May 31, 2002 Request for Advisory Opinion at ¶¶7-8. However, the Honorable Manuel Menendez, Jr., Chief Judge of the Thirteenth Judicial Circuit, has already temporarily assigned a Senior Judge as a result of Judge Foster's absence and effective May 28, 2002, by way of Administrative Order No. A-2002-035, dated May 14, 2002, Chief Judge Menendez has permanently assigned newly appointed Circuit Court Judge Denise Pomponio to Judge Foster's Division X - Drug Court. (App. "B"). In addition, assuming that the Governor has accurately projected that he can appoint a new judge as soon as September 2002, whoever he appoints will presumably need a reasonable period of time to wind down his or her practice before taking office. Accordingly, it is not reasonable to expect that any person appointed by the Governor would be ready to take office before December 2002 or January 2003. The term of the subject judgeship begins on January 7, 2003.

SUMMARY OF THE ARGUMENT

The Governor has not initiated any legal action in a court of competent jurisdiction against Pazos or the other candidates to challenge their eligibility, to void their Section 105.031 qualification, or otherwise bar them from running for office. Because the State of Florida has accepted the qualifying fees paid by Pazos and the other candidates, and has accepted their qualifications, and because Pazos and the other candidates are precluded from participating in any other race, the Governor is not authorized, and/or should be estopped from attempting, to appoint someone to the subject judgeship and thereby retroactively eliminating an ongoing valid election process.

The Florida Constitution must be construed in a manner which retains in Florida's citizens the power and opportunity to elect judges of their choice. In accordance with that construction principle, this Court should determine that under the facts and circumstances of this case there is no "vacancy" for purposes of Article V, Section 11(b), Florida Constitution.

ARGUMENT

Q:

SHOULD AN APPOINTMENT BE MADE PURSUANT TO ARTICLE V, SECTION 11 (b), FLORIDA CONSTITUTION, TO FILL A JUDICIAL VACANCY WHICH OCCURS AFTER CANDIDATES HAVE QUALIFIED FOR ELECTION TO THE JUDGESHIP WHICH HAS BECOME VACANT.

A:

THE COURT SHOULD ANSWER THE GOVERNOR'S QUESTION IN THE NEGATIVE.

Pazos joins in and adopts the arguments contained in Whalen's Brief, and submits the following additional arguments:

The Governor concedes that Pazos and the other candidates had been duly qualified by the Department of State to be elected for the subject judgeship before Judge Foster's involuntary retirement became effective. According to Section 105.031(1), Florida Statutes, "Any person other than a write-in candidate who qualifies within the time period prescribed in this subsection shall be entitled to have his name printed on the ballot."

In reasonable and detrimental reliance upon Section 105.031, Pazos and the other candidates paid, and the State of Florida accepted, their qualifying fees in the amount of \$5,200.00 each, in accordance with section 105.031(3), Florida Statutes. In reasonable and detrimental reliance upon their qualification, Pazos and the other candidates subsequently incurred additional expenses in connection with their respective campaigns. Moreover, it is too late for Pazos and the other candidates to

qualify for another judgeship group election, and/or they are apparently prohibited from attempting to participate in a different race. *See*, §100.111(4)(d), Fla. Stat. ("Any person who, at the close of qualifying as prescribed in ss. 99.061 and 105.031, was qualified for nomination or election to or retention in a public office to be filled at the ensuing general election is prohibited from qualifying as a candidate to fill a vacancy in nomination for any other office to be filled at that general election, even if such person has withdrawn or been eliminated as a candidate for the original office sought). Thus, under the facts and circumstances presented, allowing the Governor to appoint someone to the subject judgeship will place Pazos and the other candidates in an untenable "Catch-22" situation that retroactively rescinds their qualification for the subject judgeship and at the same time bars them from qualifying in the election of any other judgeship in which they would otherwise have been able to participate.

The Governor has not initiated any legal action in any court of competent jurisdiction against Pazos or the other candidates to challenge their eligibility, to void their Section 105.031 qualification, or otherwise bar them from running for office. Because the State of Florida has accepted the qualifying fees paid by Pazos and the other candidates and has acknowledged their qualifications, and because Pazos and the other candidates are precluded from participating in any other race, the Governor is not authorized, and/or should be estopped from attempting, to appoint someone to the subject judgeship and thereby retroactively eliminating an ongoing valid election process.

Allowing the Governor to appoint someone to the subject judgeship while a valid election process is ongoing would nullify the above-quoted language of Section

105.031(1) and would violate Article V, Section 10(b)(1) of the Florida Constitution which provides that "[t]he election of circuit judges shall be preserved..." Neither Section 105.031, nor Article V, Sections 10 and 11 of the Florida Constitution, make any provision for a candidate's qualification to be rescinded once a valid election process has begun. Because it is too late for Pazos and the other candidates to qualify for another judgeship group election, they will suffer irreparable injury if the Governor is permitted to retroactively void their election by appointing someone to this judgeship.

In *Spector v. Glisson*, 305 So. 2d 777 (Fla. 1974), this Court explained that the Florida Constitution must be construed in a manner which retains in Florida's citizens the power and opportunity to elect judges of their choice:

We have historically since the earliest days of our statehood resolved as the public policy of this State that interpretations of the constitution, absent clear provision otherwise, should always be resolved in favor of retention in the people of the power and opportunity to select officials of the people's choice, and that vacancies in elective offices should be filled by the people at the earliest practical date.

Consistent with the foregoing premise, this Court should determine that under the facts and circumstances of this case there is no "vacancy" for purposes of Article V, Section 11(b), Florida Constitution.

In the case of *In re Advisory Opinion of the Governor Request of September 6, 1974*, 301 So.2d 4 (Fla. 1974), this Court interpreted the term "vacancy" as used in the 1972 version of Article V, Section 11 of the Florida Constitution. In that case, this Court held that a vacancy does not occur until the date upon which the office actually becomes vacant, except when the electorate has ample time to fill the vacancy in an appropriate election process, and the effective date of the vacancy coincides with the

commencement of the terms of other judicial officers elected during the same elective process. *In re Advisory Opinion of the Governor Request of September 6, 1974*, 301 So.2d at 6-7.

In the instant matter, the Chief Judge of the Thirteenth Judicial Circuit temporarily assigned a Senior Judge in response to Judge Foster's absence and effective May 28, 2002, by way of Administrative Order No. A-2002-035, dated May 14, 2002, Chief Judge Menendez has permanently assigned newly appointed Circuit Court Judge Denise Pomponio to Judge Foster's Division X - Drug Court. (App. "B"). Because Pazos and the other candidates for this judgeship have been duly qualified and the election for that judgeship is already pending and underway, the electorate has ample time to fill the vacancy in an appropriate election process, and the date upon which the elected candidate will take office will closely coincide the date upon which any person appointed by the Governor could take office. Accordingly, consistent with *Spector*, this Court should resolve the Governor's question in favor of retaining the people's power and opportunity to select officials of the people's choice, and hold that there is no "vacancy" for purposes of Article V, Section 11(b) of the Florida Constitution.

CONCLUSION

Based on the foregoing, this Honorable Court should answer the Governor's question seeking an Advisory Opinion from this Honorable Court in the NEGATIVE.

Respectfully submitted,

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INTERESTED PARTY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy hereof was served by regular

First Class U.S. Mail on:

Hon. John Edward “Jeb” Bush, Governor
The Capital, Tallahassee, Florida 32399-0001;

Hon. Katherine Harris, Secretary of State
PL-02, The Capitol Tallahassee, Florida 32399-0250;

Kenneth C. Whalen, Esquire
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Hon. Manuel Menendez, Jr., Chief Judge
Hillsborough County Courthouse - Room 214-F
419 North Pierce Street, Tampa, Florida 33602-3549;

Jeanne T. Tate, Esquire, Chairperson - 13th JQC
418 Platt Street West - Suite B, Tampa, FL 33606;

on the 11th day of JUNE, 2002.

CARLOS A. PAZOS

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the text herein is printed in Times New Roman
14-point font, in compliance with Fla. R. App. P. 9.210.

CARLOS A. PAZOS

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Memorandum from Campaign Treasurer Carol J. Pazos. (App. "A")

Administrative Order No.: A-2002-035 (App. "B")
(Effective 05/28/2002, Dated 05/14/2002)