SUPREME COURT OF FLORIDA

CASE NO: SC02-1213

IN RE: ADVISORY OPINION TO
THE GOVERNOR
RE: APPOINTMENT OR
ELECTION OF JUDGES

BRIEF OF INTERESTED PARTY, CANDIDATE, KENNETH C. WHALEN

Kenneth C. Whalen, Esquire
P. O. Box 21002
Tampa, Florida 33622-1002
Telephone (813) 627-9202
Facsimile (813) 627-9423
Florida Bar No. 170822

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STATEMENT OF THE CASE AND FACTS

On May 30, 2002 this Court removed The Honorable Florence Foster from the Thirteenth Judicial Circuit bench for health reasons, effective at midnight on that date. Judge Foster's term of office was to end on January 7, 2003 and her position was scheduled for election at the 2002 primary and general election. During the statutory qualifying period three candidates were duly qualified for election to Judge Foster's seat and denominated as Group 30 of the Thirteenth Judicial Circuit. Having qualified, those three candidates have raised and spent campaign funds and prepared for the 2002 elections.

The Honorable Jeb Bush, Governor has requested an advisory opinion from this Court as to whether the vacancy should be filled pursuant to the provisions of Article V, Section 11(b) of the Florida Constitution. If an appointment is made, the Group 30 election would have to be removed from the ballot as the term of the Judge appointed would not end until January of 2005.

The Court has invited responses from interested parties and has specifically served the three qualified candidates with a copy of its Order. This brief is a response to the Court's invitation.

ISSUE BEFORE THE COURT

THE GOVERNOR'S REQUEST FOR AN ANSWER TO THE FOLLOWING QUESTION: 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?

SUMMARY OF THE ARGUMENT

The public policy of Florida is to favor election over appointment when confronted with a vacancy in an elected office. Several prior decisions of this Court have held that the public's right to elect is paramount to the appointive process to fill vacancies where that is possible by virtue of the timing of election dates.

The amendment to Article V, Section 11(b) approved in 1996 changed only the length of the term of a judge appointed to fill a vacancy. It did not overrule prior decisions concerning the priority of election over appointment. The passage of the amendment by the voters in 1996 did not change the way judges are selected. The citizens of the state of Florida have overwhelmingly expressed their preference for electing circuit and county judges in the November, 2000 election.

Article V, Section 11(b) does not overrule Article V, Section 10(1)(a) which requires circuit judges to be elected rather than appointed. Section 11(b) and Section 10(1)(a) must be read together to permit the appointment of judges to fill vacancies created before the official start of the election process to fill an expiring term of office. Once the election process officially begins, Section 10(1)(a) calling for the election of circuit judges must take priority. A line must be drawn when the election of judges takes priority over appointment, otherwise the appointment process may have the effect of overruling or voiding a contested judicial election. A reasonable point at

which to draw the line is when candidates qualify and the election process becomes official according to Florida Statutes.

Extended vacancies in the courts of this State can be avoided by the appointment of judges to fill vacancies when there is no election pending to fill the seat vacated. A relatively short vacancy in an office where the election process has officially begun does not damage the working of the courts sufficiently to override the constitutionally protected right of the people to elect their circuit and county judges. Senior Judges can and do serve to help the courts overcome short term vacancies in judicial offices.

This Court should answer the Governor's question in the negative and allow the already initiated election process to proceed.

ARGUMENT

I. Public Policy of the State of Florida Favors Election Over Appointment

Prior decisions of this Court have established that the public policy of Florida is to favor election over appointment when confronted with a vacancy in an elected office.

Spector v. Glisson, 305 So. 2d 777 (Fla. 1974) was a case which was very similar. The case involved the vacancy created by the resignation of Justice Richard W. Ervin from the Supreme Court of Florida. Sam Spector and former Justice Arthur England applied for a place on the ballot for election to the Supreme Court. The issue was slightly different in that Justice Ervin had made his resignation effective in January so as to allow an election the preceding fall therefore negating the possibility of an empty seat. In the Court's opinion the Court stated it is ". . . 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 . . ." Id. at 781. The Court went on to say:

> We feel that it necessarily follows from this consistent view and steadfast public policy of this State as expressed above, that if the elective process is available, and if it is not expressly precluded by the applicable language, it should be utilized to fill any available office by vote of the people at the earliest possible date. Thus the elective process retains that primacy which has historically been accorded to it consistent with the retention of all powers in the people, either directly or through

> their elected representatives in their Legislature, which are not delegated, and also consistent with the priority of the elective process over appointive powers except where explicitly otherwise provided. We thereby continue the basic premise of our democratic form of government, that it is a 'government of the people, by the people and for the people.'

Id. at p. 782.

That public policy was reaffirmed six years later when the Court stated "(It is the) steadfast public policy of this State . . . that if the elective process is available, and if it is not expressly precluded by the applicable language, it should be utilized to fill any available office by vote of the people at the earliest possible date." Republican State Executive Committee v. Graham, 388 So.2d 556 at p. 558 (Fla. 1980).

In Judicial Nominating Commission v. Graham, 424 So. 2d 10 (Fla. 1982), the Court revisited the subject again. In that case, the Honorable Thomas E. Kirkland, Circuit Judge for the Ninth Judicial Circuit, died on August 6, 1982, and the Honorable Richard B. Keating, Circuit Judge for the Ninth Judicial Circuit, died on August 16, 1982. Also on August 16, 1982, the Honorable James Stroker, County Judge for Orange County, created another vacancy by resigning from office effective January 1, 1983. Then Governor Graham called for a special election to fill all three seats coinciding with the regular elections scheduled for the fall of 1982. The Judicial

Nominating Commission sought to have the Governor fill the seats by the appointment process. The Court held:

> In summary, if the vacancy is known in sufficient time to schedule a special election during the already scheduled primary and general election dates, then a special election should be held. On the other hand, if an irrevocable communication of an impending vacancy is presented to the governor ***at the time of or after the first primary***, then we have held there is insufficient time to use the primary and general election process during that year and the governor is authorized to use the merit selection process for a term ending in January following the general election two years later. *[Emphasis added.]*

Id. at p. 12.

The public policy of Florida is thus to permit election to fill vacancies rather than resorting to appointment where that is possible by virtue of the timing of election dates.

II. The 1996 Amendment to Article V, Section 11(b), Florida Constitution

With the exception of the words "occurring at least one year after the date of appointment" Article V, Section 11(b), Florida Constitution remains virtually identical to the language controlling at the time of the Spector and Graham cases.

The only reported case dealing with this issue and decided after the 1996 amendment is Pincket v. Harris, 765 So. 2d 284 (Fla. 1st DCA 2000). That case is distinguishable on its facts because the vacancy dealt with in that case occurred before any candidate had qualified for election to the office. In Pincket, Tenth Circuit Judge Robert Young, whose term was scheduled to end in January, 2001, resigned on June

20, 2000, several weeks before the beginning of the qualifying period.[1] The First District Court of Appeal concluded that the 1996 amendment superseded the earlier cases such as Spector and Graham, Id. at p. 288.

In the instant case, the Secretary of State has certified the position as being available for candidates to file, three candidates have filed and qualified and the Secretary has certified that those candidates have qualified and their names should be placed on the ballot for the primary election to be held on September 10, 2002.

Pincket, id., should be limited to its facts and should apply only to vacancies which occur before candidates have duly qualified pursuant to the Florida Election Code, Fla. Stat. §97.011 et. seq. Further, the decision in Pincket is contrary to prior decisions of this Court construing the exact language, except for the length of the appointed term. In all other material respects, the language is the same as it was when this Court ruled in Spector and Graham.

Historically, this Court has strongly favored the election process over appointment whenever possible as the public policy of this State. The Pincket Court referred to the amendment having gone before the voters and the voters having accepted the change as partial rational for its decision. In recent years there has been

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[1] The qualifying period for circuit and county court judges was changed from its traditional July time period to May 13, 2002 thru noon on May 17, 2002 by the passage of an amendment to Florida Statutes §105.031, which was signed by the Governor on April 11, 2002, effective with the 2002 elections. 2002 Fl. ALS 17; 2002 Fla. Laws ch. 17; 2002 Fla. SB 618.

a movement for all Judges to be appointed in the same manor as Justices of this Court and Judges of the District Courts of Appeal. Regardless of the appeal of such a selection process, in the November 7, 2000 election (approximately three months after the Pincket decision) the voters rejected that approach in favor of retaining elected Circuit and County Judges. The voters of Hillsborough County rejected the appointive process 69 percent to 31 percent and results were similar in the rest of the state.[2] Despite the change in Section 11(b) in 1996, the voters have reinforced the prior decisions of this Court that they should have the right to vote for their local judges, if there is sufficient time to do so. There is sufficient time to do so in the instant case.

III. Purpose of the 1996 Amendment to Article V.

The Report of the Article V Task Force which prepared the 1996 amendment stated as its reasons for the amendment:

> The task force determined that a minimum term of office would serve several functions. First, it would enhance the quality of candidates applying for the bench because many persons are unwilling to sacrifice successful legal practices for the uncertainty that they could face an election challenge immediately after taking office. Second, the minimum one-year term of office would afford the newly appointed judges the opportunity to develop skills as judges and not be forced to immediately wage a campaign. Third, the minimum one-year term

[2] Results obtained from the official web site of the Florida Secretary of State. http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/7/00&DATAMODE=

> would provide the newly appointed judge the opportunity to develop a record before facing an opponent.

Final Report of the Florida Article V Task Force, p. 23 (1995).

The Task Force only was addressing the length of the term of office for a newly appointed judge for the reasons stated. It did not address the issue of the timing of such an appointment. The amendment does not alter the prior case law.

Article V, Section 11(b), Florida Constitution does not contemplate the current situation wherein candidates have qualified for election to an office only to have the election process voided and the office removed from the ballot by an appointment because of the new language. The literal interpretation requiring an appointment to the vacancy created by Judge Foster's removal would require this Court to draw a line which the constitution, nor the voters of the state, contemplated when Article V, Section 11(b) was passed. The line which must be drawn is the time when the election process called for in Article V, Section 10(b)(1), Florida Constitution take precedence over the appointive process outlined in Article V, Section 11(b), Florida Constitution. Taking the literal interpretation to the extreme, what if Judge Foster had decided not to seek re-election or lost the election and was then removed for health reasons (or any other reason) in mid November, 2002. Would the Constitution require the Governor to appoint someone to fill the vacancy at that time? If so, what would happen to one of the current three candidates who, at that time, would have been elected to the office,

whose term did not begin until January 2003. Would the appointment process then void the election and prevent the new Circuit Judge, duly elected by the people, from taking office? Where does one draw that line? The more reasonable interpretation is to draw that line upon the qualification of candidates for election to the office. It is then that the candidates and the voters have a vested interest in that particular election. It is then that the electors have official candidates. It is then they have the opportunity to make an informed choice and to vote for the person they want to become a judge. The voters have made it overwhelmingly clear that they want to have the opportunity to elect their circuit and county judges.

The interpretation argued herein would continue to permit the appointment of Circuit and County Court Judges by the Governor when vacancies occur at all other times. However, when the term of a judge is scheduled to expire and elections are therefor required, it would give preference to the election process once the official machinery has been set in motion to hold such an election. This would generally be a rare circumstance such as that which has occurred in the instant case. It would only be possible for this to occur when a judge resigns or is removed from office between the qualifying period and the natural expiration of that judge's term of office. In such a limited circumstance it would seem a reasonable interpretation to adhere to the expressed public policy of this State and the express wishes of the voters and give priority to Article V, Section 10(b)(1) over Article V, Section 11(b).

IV. The Issue of an Extended Vacancy.

There has been concern expressed in the past by this Court about the strain on the Judiciary as a result of long term vacancies on a particular court. In fact, the Graham Court expressed as dicta in its opinion that the current version of Article V, Section 11(b) be adopted as one alternative to long vacancies on the courts. While that is certainly a concern, such a concern should not override the public policy of the State and the clear direction of the constitution and the voters that circuit judges should be elected, if at all possible. In the instant case, it is unlikely that an appointment could move through the process before September or October. Giving the new appointee time to close out his or her practice would likely result in the appointee not taking office until at least October or November. The election process would result in a new elected judge as early as September 10, 2002 and no later than November 5, 2002 with that judge taking office in early January, 2003. The resulting delay of one or two months would not result in an undue hardship on the Thirteenth Circuit with 35 other judges. In addition, the Thirteenth Circuit is fortunate to have several experienced senior judges who have served and are currently serving in existing vacancies. It is likely that a senior judge has or will be asked to fill in for Judge Foster until a successor can assume office whether that be elected or appointed. There is no reason to assume that a senior judge could not extend that service and fill the last two or three months of this position until an elected judge could take office.

It would also seem to be a small price to pay in order to give effect to the strong preference for elections. " 'It has been said that the Only excuse for the appointment of any officer made elective under the law Is *[sic]* 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.' *citing* 63 Am.Jur.2d, Public Officers & Employees, s 128, p. 708, citing Patterson v. Burns (DC Hawaii), 327 F.Supp. 745; Todd v. Johnson, 99 Ky. 548, 36 S.W. 987; State ex rel. Laurer (Lanier) v. Hall, 74 N.D. 426, 23 N.W.2d 44." Spector, supra. at p. 781.

CONCLUSION

This Court has repeatedly held in the strongest terms that the public policy of Florida is to favor the election of circuit judges where time permits an election. The current constitutional provisions of Article V have worked well for vacancies which occur after the primary election in one election cycle and before the qualifying period in the next election cycle. A line must be drawn at some point which gives effect to Article V, Section 10 of the constitution which states "The election of circuit judges shall be by a vote of the qualified electors within the territorial jurisdiction of the court." At the time of qualification, candidates become official certified candidates for the office. They become a "quasi official" of the State, subjecting themselves to financial disclosure laws, campaign finance laws, judicial canons and other

requirements. The line must be drawn and, it would seem that the logical point to draw the line would be upon qualification of official candidates for the office.

This Court should hold that in order to reconcile the provisions of Article V, Section 10(b)(1) and Article V, Section 11(b), the appointive process must yield to the elective process once a the official qualification period is opened and a candidate is officially qualified for the position. This situation will occur only rarely. It will only occur when a vacancy is created after the statutory qualifying period and only for those judicial offices normally scheduled for election in the year of the vacancy. Therefore, this Court should answer the Governor's question in the negative and allow the already initiated election process to proceed.

Respectfully submitted,

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Kenneth C. Whalen, Esquire
as a Candidate for Circuit Court Judge,
Thirteenth Judicial Circuit, Group 30
P. O. Box 21002
Tampa, Florida 33622-1002
Telephone (813) 627-9202
Facsimile (813) 627-9243
Florida Bar No. 170822

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 7, 2002, a true copy of the foregoing has been furnished by U. S. Mail to:

Hon. Jeb Bush, Governor, The Capital, Tallahassee, FL 32399-0001;

Hon Katherine Harris, Secretary of State, PL-02, The Capital, Tallahassee, FL 32399-0250;

Martha Jean Cook, Esquire, Bank of America Plaza, 100 N. Tampa Street, Suite 2100, Tampa, FL 33602;

Carlos A. Pazos, Esquire, Himes Office Center, Suite 204, 2701 N. Himes Avenue, Tampa, FL 33607-6015;

Hon. Manuel Menendez, Jr., Chief Judge, Hillsborough County Courthouse, Room 214-F, 419 Pierce Street, Tampa, FL 33602-3549;

Jeanne T. Tate, Esquire, JNC Chair, 418 W. Platt Street, Suite B, Tampa, FL 33606.

_____

Kenneth C. Whalen, Esquire
P. O. Box 21002
Tampa, Florida 33622-1002
Telephone (813) 627-9202
Facsimile (813) 627-9243
Florida Bar No. 170822