

IN THE SUPREME COURT OF FLORIDA

CASE NUMBERS: SC 01-2079 & SC 01-2062

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KHURSHID KAHN, M.D. et al.,  
Petitioners.

v.

RAYMOND PFEIFLER and  
CYNTHIA PFEIFLER, his wife,  
Respondents.

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PHYSICIANS HEALTHCARE  
PLANS, INC., et al.,  
Petitioners,

vs.

RAYMOND PFEIFLER and  
CYNTHIA PFEIFLER, his wife,  
Respondents.

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**PETITIONER, PHYSICIANS HEALTHCARE  
PLANS, INC.'s REPLY TO RESPONSES TO  
ORDER TO SHOW CAUSE**

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## FACTS

The Pfeiflers (hereafter Respondents) deny that there is a “complex case division.” The “division” is what it is: Judge Brescher identified it clearly as such. App. 13, Supp. App. 3. Further, Respondents’ and the Attorney General’s (hereafter AG) assertion that cases return to the elected judge if not reached for trial is false; they are rolled over to the following year’s senior judges’ calendar.<sup>1</sup> App. 16.

AG notes that not all judges routinely transfer trials longer than one week to the senior judges’ docket. However, the fact that some judges do not participate in the unconstitutional practice does not justify the practice. AG further notes that senior judges are also used for criminal cases. Petitioners, civil litigants, challenge the referral of civil cases that will require more than two weeks for trial to the “complex case division” known as the “senior judges’ docket.” Respondents also assert that “a party must first make a request...that the case be tried by a senior judge.” Brief at 2. This is not necessarily so. The general procedure is without party input and is by means of a memorandum request from the assigned judge to the administrative judge

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<sup>1</sup>The senior judges docket has now been expanded to a full year and the docket is called once a year. A case that was not placed on the 2002 docket by October, 2001, will not reach a docket until 2003, regardless of when it became an issue. Placement on the docket is dependent upon when the division judge decides to refer the case to the administrative judge.

for relegation to the senior judges docket. App. 34, Supp. App. 67, 68, 69, 71, 73.

AG and Respondents recite that the Seventeenth Circuit disposition rate is statistically the highest in the state. Petitioner does not challenge the laudable efforts of the Seventeenth Circuit to achieve this distinction and recognizes that reaching the jury and resolving the case is the ultimate goal of the system. As Petitioner Kahn argues, justice delayed is justice denied.<sup>2</sup> However, achieving the state's highest disposition rate should not come at the price of the sacrifice of the people's suffrage rights. A balance must be achieved between judicial efficiency and the right to elect and hold accountable the judges who preside over the people's disputes.

AG next states that no argument was made in the lower court that the "complex case division" constituted an actual division or that senior judges were being used who did not qualify as such. But see, discussion, infra, at 5.

### **NATURE OF THE RELIEF SOUGHT**

AG submits that no relief is necessary. However, absent prohibition this case will be heard on the retired judges' docket, some of whom are not qualified to serve as retired judges or in Broward County. This Court's reasoning in issuing a writ may

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<sup>2</sup>Respondents say there is no record of delay in the complex case division. But, see, Supp. App. 91(a transferred case would not reach senior judges docket until July, 2001, but elected judge could have tried it in early 2001), App. 17(party may ask for return to elected judge to reach trial sooner).

provide adequate guidance to prevent future infirmity, but specific prohibition of infirm practices is also appropriate.

### **ARGUMENT**

AG discusses the necessity for use of senior judges, citing, first, this Court's acknowledgment that one senior judge year costs only 30 percent of a circuit judgeship and, next, the cost effectiveness of senior judges in addressing calendar problems and emergencies. AG suggests that the Seventeenth Circuit may appropriately use less expensive resources to dispose of entire "calendars." Petitioners are aware of the growing volume and complexity of litigation and of the limited financial resources of the state. The question is, does a budget crunch which has led the Legislature to reject the certifications of need for additional judgeships and which, in turn, has raised circuit court caseloads across the board justify wholesale abrogation of the suffrage rights of the people of the Seventeenth Judicial Circuit? If this is the disease that the Seventeenth Circuit is attempting to treat, this Court must prohibit use of a cure that is worse than the disease.

The power of appointment should be available to address calendar problems of sufficient severity to pass constitutional muster. An emergency of the public business **does** constitutionally justify an invasion on the suffrage rights of a litigant. Spector v. Glisson, 305 So. 2d 777 (Fla. 1974). Problems like those arising from the speedy trial

rule or housing cap may justify<sup>3</sup> a limited invasion of suffrage rights, for the public interest may require that those who may be guilty of crimes not be released solely because of the circuit's heavy caseload. Retired judges should serve in circumstances constituting an appropriate exigency. No such circumstances exist in this case or in the complex case division of the Seventeenth Circuit.

AG next raises "procedural problems," arguing that challenge to qualifications of retired judges is premature because Petitioners do not know who will preside at trial. It is true that the identity of the presiding judge is as yet unknown. However, the identity of the judge is unknowable under the current practice. Not until the parties are called to pick a jury do they learn the identity of the former judge who has consented to sit on the bench that week.<sup>4</sup> At that time, an attempt to secure relief in this Court would surely be so late as to be ineffective, for the parties will find themselves in trial before relief can be had. Inclusion of unqualified persons can be redressed now. Under the cases cited by AG, standing exists where there is an actual controversy and the facts are ascertainable. *E.g., Department of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994). The list of judges staffing the complex case division is known.

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<sup>3</sup>Petitioner does not predict what the ruling should be in such a case.

<sup>4</sup>Unlike elected judges, senior judges are not required to sit during the year-long docket. Week by week, those on the list decide whether they will or won't; cases are assigned as judges announce availability for that week or month.

Those who are not eligible for service are identified and identifiable. App. 9, Supp. App. 81. A writ of prohibition can issue to prevent unretired and nonlocal judges from serving by appointment.

AG next contends that Petitioners lack standing to raise the rights of third parties. To the contrary, Petitioners assert their own rights to vote for the judges of the Seventeenth Circuit.

AG also argues that the issues raised by this Petition were not raised below. But see, Supp. App. 81, 85 (out-of-area judges); 83, 94 (creation of a division); 84, 85 (right to elect); 92 (failure to seek elected judge prior to transfer); 104 (recognition that senior judges must be retired); 113 (half of judges on list of senior judges are not retired within meaning of constitution).<sup>5</sup> Further, AG separates portions of the reasoning of the Petition from the challenges that are presented. For example, AG argues that the requirement of “an emergency of the public business” was not raised below. However, the requirement of public emergency is a standard by which an invasion of suffrage rights may be permitted, but which cannot be said to justify that invasion here. Even AG’s own brief cannot justify senior judges without referring to emergencies. AG Resp. 15.

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<sup>5</sup>The order denying return to the active judge’s division acknowledged that **several** grounds were raised, though it addressed only three “primary” grounds.

AG next argues that Petitioners should seek certiorari in the district court. However, Wild v. Dozier, 672 So. 2d 16, 17-18 (Fla. 1996), places jurisdiction in this Court for challenges to appointments of retired judges. No case cited by AG involves assignment of retired or senior judges.

Further, AG argues that there is no reviewable order. The Order Denying Motion to Vacate is surely an order. Further, the practice of the Seventeenth Circuit is largely unwritten - part of its infirmity. Rather than adopt a local rule creating a special complex case division, which would involve public input and require this Court's approval, the Seventeenth Circuit practice is:

And what we do, as I'm sure all of you know, is that **we have each of our fourteen civil division, allow them to send cases to this docket**, and we have, of course, a time period in which **they can submit what cases they want**.

Petitioners' App. 13. Consequently, rather than generate orders of appointment, the practice simply generates memos requesting placement on the senior judges docket and then orders setting trial on that docket. E.g., App. 323. Finally, AG suggests that there is a "possibility" of waiver because the first challenge to the assignment was in July 2000 and that challenge was denied November 13. However, the case was removed from the initial trial docket and continued before the active elected judge until a new trial order was entered. Supp. App. 69. Under AG's own reasoning, challenge

in this Court could have been considered premature until the case was finally set for trial and calendar was called.<sup>6</sup>

With respect to creation of a special division, AG relies upon Mann v. Chief Judge of the Thirteenth Judicial Circuit, 696 So. 2d 1184 (Fla. 1997)(approving drug division of criminal court); Robertson v. State, 719 So. 2d 371 (Fla. 4th DCA 1998), and Heaton v. State, 711 So.2d 1157 (Fla. 4th DCA 1998). Petitioners have said that Robertson was wrongly decided for reasons set forth in the Petition. Heaton is a second application of Mann, which should not control for the same reasons.

AG then dismisses the reasoning of Judge Farmer in Williams v. State, 596 So.2d 791 (Fla. 4th DCA 1992) by explaining that Judge Farmer’s actual purpose was to highlight a “problem” with the “imaginative use of county judges to create an additional circuit judge that the legislature has declined to give him.” AG’s elucidation returns us to the “disease” of underfunding for which AG suggests the senior judges’ docket is a permissible cure. The “complex case division” of senior judges is used to create additional judgeships that the legislature has declined to give the Seventeenth Judicial Circuit.

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<sup>6</sup>The case was also subject to being mooted by partial settlement which would have reduced estimated trial time. Then, “If you want ... to go back to the trial judge in hopes of getting a quicker resolution ... your avenue of relief [is] to ... say, Judge, the case is no longer a senior judge case. I’m asking that you retake it back on your docket”. App. 117. The division judge clearly controls the transfers.

AG devotes only a page and a half to the rights of suffrage and concludes that the right to elect judges is “in general” preserved by the Constitution, its importance is self evident, but it is “essentially, irrelevant.” AG Resp. 35-36. Clearly, under Spector, this right is not “essentially, irrelevant” but is primary and ascendant. 305 So.2d at 778.

AG then in a single footnote proposes that election of judges has nothing to do with accountability, for judges “should not have a constituency.” AG Resp. 36, n. 7. AG overlooks the facts that accountability is the primary basis for electoral control over public officials and was deemed so important that the voters of the Seventeenth Circuit rejected merit selection. As stated by Judge Farmer in Miller v. Gross, 788 So.2d 256 (Fla. 4th DCA 2000), rev.denied, 770 So.2d 159, 261 (Fla. 2000):

While judges may not represent that territory in the same way that legislators do, it is quite understandable that the citizens of Florida would want their judges to be acquainted with the problems of the community, to be familiar with its history and mores, to have actually lived within its confines and experienced its recent history, in order to judge its cases.

AG relies upon House v. State, 790 So.2d 1104 (Fla. 2001) as having disposed of the suffrage issue raised herein. However, this Court’s denial of a Petition for Writ of Prohibition is **not** a ruling on the merits unless it specifically says so. Barwick v. State, 660 So.2d 685, 691 (Fla. 1995). Accordingly, neither that case nor Brown &

Williamson Tobacco Corp. v. Schneider, 705 So. 2d 7 (Fla. 1997), **adjudicated** the issue raised in this Petition.

AG next argues that “[w]here the Florida Constitution **does not qualify the power of the Chief Justice to assign retired justices or judges**” it is inappropriate to engraft a requirement of an emergency of the public interest on its use. AG Resp., 37. AG then sarcastically equates Petitioner’s reliance upon Spector’s standard of “emergency of the public business” to a Fourth District tongue-in-cheek reference to snook. AG’s farcical use of district court dictum misapprehends the law. It is **not** true that the Constitution does **not** limit the power of appointment. **The power of appointment is limited in the Constitution by the Constitutional guarantee that the people retain the right to elect their judges.** This case raises the issue of when and how the balance between the two constitutional provisions must be struck; no levity or glibness should detract from the serious task this Court performs in resolving that issue.

Spector quoted and used language of “emergency of public business” as a means of explaining its balance between the power of appointment and the right to elect. Spector’s holding is that the power to appoint must give way to the power to elect. This is the point of the eight pages which AG deemed “essentially, irrelevant.”

A balance must be struck. The cases discussed in those pages indicate when and how.

Nor does striking a balance “nullify” the power to appoint, as AG contends. To the contrary, AG’s reasoning, and the practice which is challenged here, nullify the right to vote. We come full circle to the emergency of the public business. The power to appoint must be justified and the circumstances to which AG initially referred, “emergencies” as stated in In re Certification of the Need for Additional Judges, 688 So.2d 321, 325 (Fla. 1997), present the justification.

AG then contends that Rivkind v. Patterson, 672 So.2d 819 (Fla. 1996) provides the correct standard the power of appointment, i.e., “to maximize the efficient administration of justice.” However, such a standard would permit appointment of senior judges in **any** circumstance **except** when the senior judge would **hinder** the administration of justice. That standard would nullify the power to elect, for it is virtually undefinable and unassailable.

AG then throws out a red herring by arguing that this Court should not have to “declare” an emergency prior to exercising its right to appoint a retired judge. Petitioner proposes no such requirement of “declaration.” Petitioner proposes only that, on a case-by-case basis, the power of appointment delegated to and exercised by the Seventeenth Circuit be justified by the standard set forth in Spector, an

emergency of the public business.

Reference to the categories first established in 1961 demonstrates such “emergencies.” The reason that the category of “civil cases of long duration that would **otherwise disrupt civil calendars**” has become problematic is evident in the Responses to the Order to Show Cause in which the category is redefined as “civil cases of two weeks or more duration.” The qualification that the case be of such duration that it “otherwise disrupts civil calendars” is totally disregarded. In order to meet the standards of Spector, duration must be such that it disrupts more than its own docket. Consumption of a single docket cannot rise to this level of “disruption” or every case on the docket would “disrupt” to some degree and thus be assignable. This Court’s discouragement against assignment of complex cases demonstrates that this category is not intended to include the instant case or others like it. This Court’s discouragement should be honored in the instant case and in other complex cases.

In Rivkind, *supra*, which AG contends supports the instant appointment and practice, the threat of repeated physical violence against family members **is** in the nature of an “emergency” of the public business. Moreover, that case involved a duly created family division augmented by elected county court judges. Family divisions had been legislatively mandated and had overlapping jurisdiction with county criminal courts to hear domestic violence cases. In the context of this legislative

“Frankenstein” and its potential for “administrative morass,” reciprocal appointments of county court judges to circuit cases, and vice versa, were approved. Holsman v. Cohen, 667 So.2d 769 (Fla. 1996). See, also, In re Report of the Commission on Family Courts, 646 So.2d 178 (Fla. 1994). We see none of these unique circumstances here.

As for whether retired judges must literally be retired, the Chief Judge and Respondents acknowledged in the lower court that “retired” mean “retired” at age 70 and not just “former.” Supp. App. 104. Respondents again concede that temporary assignment is for judges over the age of seventy at page 7 of their response. AG overlooks the definition of “retired” set forth in In re: Rules Governing Assignment to Duty of Retired Justices and Judges, 236 So.2d 769, 770 (1970). The definitions of eligibility for retirement that AG argues were “repealed” and presumably no longer support this point were actually subsumed into those set forth in the statewide retirement system. Sections 121.046, 121.021(2), (29), Fla. Stat. (2000).<sup>7</sup> There simply is nothing further to say on this point - “retired” in the constitutional sense does not mean “former.” It means “retired” and eligible for retirement benefits.

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<sup>7</sup>Section 121.021(c)(3), Fla. Stat., provides that a judge who retires from the state retirement system is eligible for judicial service if he or she has had at least 5 years of judicial service at the time of retirement.

As for geographic qualification, AG asserts that the change<sup>8</sup> in Constitutional language regarding qualification is “essentially irrelevant.” To the contrary, all Constitutional language must be given effect. AG then argues that “qualified” and “eligible” are different words with different meanings, that “qualified” refers to the “kind of case assigned,” not to the judge’s appointability to circuit court. However, there is no “qualification” for a particular “kind of case” set forth in the Constitution nor does AG cite one. AG then suggests that “qualification” refers to the number of a prospective judge’s years of Bar membership, which determines whether that person may sit on the county court, the circuit court, or the district and supreme courts. However, those “qualifications” appear in the same Constitutional provision, Article 5, Section 8, in which the geographic limitation is found, i.e., the section on “eligibility.” It is this same section which imposes the mandatory retirement age and then excepts temporary appointment for retired judges. Only a contortionist could find a way to manipulate Section 8 to apply to retired judges’ appointments but not to their eligibility.

The “eligibility” requirement of Section 8 must be met. No person is eligible to

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<sup>8</sup>In 1972, the requirement that the appointed judge be “qualified” was added to Article 5, Section 2(b), Fla. Const. At the same time, all judges for the first time were required to “reside in the territorial jurisdiction of [their] court[s]” by Article 5, Section 8, Fla. Const. This language must be given effect.

occupy the office of judge unless he resides in the jurisdiction. These requirements are not limited to active judges and do not exclude retired judges.

Respondents argue that out-of-area assignments have previously been made, citing State v. Himes, 184 So. 648 (Fla. 1938), which arose before the addition of the qualification language in Article 5, Section 2, and the addition of geographic limits for eligibility in Article 5, Section 8. Cases cited by Respondents do not address these changes; they appear to perpetuate former law without having been alerted to the issues raised by these Petitioners. Judges of Polk County Court v. Ernst, 615 So.2d 276 (Fla. 2d DCA 1993)(assumes because circuit judges may be appointed to other circuits, county courts may be appointed to other counties), citing, Card v. State, 497 So.2d 1169 (Fla. 1986)(issues limited to lack of Supreme Court order of assignment and failure to object to the de facto judge).

Finally, Respondents argue that the senior judge appointments are “temporary” under Article 5, Section 2(b), Fla. Const. Petitioners do not argue that successive assignments of a particular judge exceed sixty days and thus are not “temporary” assignments. Petitioners argue that the complex case division is an unconstitutional permanent “special” division. Though not specifically cited in Payret v. Adams, 500 So. 2d 136 (Fla. 1986), Article 5, Section 7, Fla. Const. was necessarily implicated and at issue in that case and demonstrates the invalidity of the complex case division.

## **CONCLUSION**

A writ should issue to prohibit: exercise of the judicial office by senior judges over this case; maintenance of a “complex case division” absent constitutional formation; transfers of cases to retired judges for the sole reason that they are complex cases with expected trial duration of two weeks; and service by persons who are not retired in the Constitutional sense and are not residents of Broward County.

## **CERTIFICATES OF SERVICE AND COMPLIANCE**

WE HEREBY CERTIFY that a true copy of the foregoing was served by mail this 13th day of December, 2001 on: Michael Freedland, Esq., 2665 Executive Park Drive, Suite 3, Weston, FL 33131; Gary Farmer, Esq., 6550 N. Federal Hwy., Suite 511, Ft. Lauderdale, FL 33308; Nancy Gregoire, Esq., 888 East Las Olas Blvd., Suite 400, Ft. Lauderdale, FL 33301; Charles M. Fahlbusch, Esq., Office of the Attorney General, 110 S.E. Sixth Street, 10th Floor, Ft. Lauderdale, FL 33301; Kevin O’Connor, Esq., 2801 Ponce de Leon Blvd., Suite 900, Miami, FL 33134; Mark Morrow, Esq., 499 N.W. 70 Avenue, Suite 108, Plantation, FL 33318; F. Bryant Blevins, Esq., 2950 S.W. 27 Avenue, Suite 200, Miami, FL 33133.

I HEREBY CERTIFY that the foregoing Reply to the Responses to Show Cause was prepared in Times New Roman, 14 point.

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