IN THE SUPREME COURT OF FLORIDA

ROBERT J. PLEUS, JR.,

Petitioner,

v. Case No. SC09-565

HON. CHARLES CRIST,
GOVERNOR,

Respondent.

ON ORIGINAL PETITION FOR WRIT OF MANDAMUS

AMICUS BRIEF OF THE APPELLATE PRACTICE SECTION OF THE FLORIDA BAR IN SUPPORT OF THE PETITIONER

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

This amicus brief is filed on behalf of the Appellate Practice Section of The Florida Bar. The Executive Council of the Section voted 21-2 to file this brief, in response to a unanimous request from the judges of the Fifth District Court of Appeal asking the Section to file an amicus brief.

The Section is comprised of more than 1500 appellate practitioners and judges across the State of Florida, united in promoting the administration of justice and the integrity and professionalism of the appellate process. The Section's interest in the cause here is to maintain the integrity of the judicial selection process, public confidence in the judicial selection process and the appellate courts in Florida, and in the administration of justice through full staffing of the appellate courts in Florida.

This filing was approved by the Executive Committee of the Board of Governors of The Florida Bar on April 14, 2009 consistent with applicable standing board policies. It is tendered solely by this Section, supported by the separate resources of this voluntary organization – not in the name of The Florida Bar, and without implicating the mandatory membership fees paid by any Florida Bar licensee.

SUMMARY OF THE ARGUMENT

The Court should grant the Petition because the Governor has a non-discretionary obligation to appoint a judge to the Fifth District Court of Appeal. Article V, Section 11 of the Florida Constitution contains a mandatory obligation: the Governor shall select one of the nominees presented by the judicial nominating commission ("JNC") within 60 days. There is no room for discretion. Accordingly, a Writ of Mandamus is appropriate.

ARGUMENT

I. MANDAMUS IS VITAL AND PROPER TO PROTECT THE INTEGRITY OF THE JUDICIAL SELECTION PROCESS.

Article V, section 11 of the Florida Constitution governs judicial vacancies such as that left here by the mandatory retirement of Judge Pleus. It provides,

> Whenever a vacancy occurs in a judicial office to which election for retention applies, the governor *shall* fill the vacancy by appointing ... one of not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission.

Art. V, § 11(a), Fla. Const. (emphasis added). The Governor has a non-discretionary duty to appoint a new judge to a vacancy and that the new judge must come from a list of between three and six persons nominated by the appropriate JNC. Moreover, nothing in the Constitution grants the Governor the power to reject the slate, authority that is specifically granted in other contexts, but not here. *Compare* Art. V, § 11(a), Fla. Const. ("the Governor shall fill the vacancy") *with*

§ 43.291 (Fla. Stat. 2008) (granting the Governor authority to reject the slate of nominees from the Board of Governors of The Florida Bar for the judicial nominating commission of each district).

Moreover, the Florida Constitution provides a hard and fast deadline for making the appointment.

> The governor *shall* make the appointment within sixty days after the nominations have been certified to the governor.

Art. V, § 11(c) (emphasis added). Thus, there is a clear constitutional duty for the governor to appoint one of the three to six nominees certified by the JNC within 60 days. Every Florida Governor takes that oath to fulfill his or her constitutional duties. *See* Art. II, § 5(b), Fla. Const. (requiring all state officers to swear or affirm that they "will well and faithfully perform the duties of" their office).

Here, the Fifth District Court of Appeal's JNC certified the maximum of six nominees to the Governor on November 6, 2008, which gave him until January 5, 2009, to make the appointment. (Petition Exhibit C.) After the Governor demanded a new list (Petition Exhibit D), the JNC reconvened and confirmed that the six nominees were the "most qualified applicants for nomination" based on its personal investigation of each application and list of references, personal interviews with each applicant, and review of the applicable criteria (specifically including "racial, ethnic, and gender diversity") (Petition Exhibit E). Therefore, it

resubmitted the same list of six nominees on December 4, 2008. (*Id.*) While it is far from clear that it had the authority to submit a second list, even if it did, the Governor had until February 2, 2009, to appoint one of the six.

The Governor failed to fulfill this mandatory duty. After the deadline passed, the chief judge of the Fifth District informed the Governor that the failure to appoint a replacement for Judge Pleus was "adversely impacting the court, affecting the assignment of cases, the scheduling of oral argument, the timely disposition of cases, and the utilization of staff personnel." (Exhibit F.) Both the JNC and Judge Pleus have respectfully asked the Governor to explain the legal basis for his failure to make an appointment, but none has been given. With all due respect to the Governor and his commendable attention to diversity, there is no legal basis for his failure to appoint a judge at this stage.

As noted in Judge Pleus' Petition and above, the Governor has a non-discretionary duty to select from the list of nominees presented by the JNC. If the Governor has the authority to reject out-of-hand a list presented, it will not only subvert the process, but tacitly control future nominations and chill the free will of the JNC's members. In *In re: Advisory Opinion to the Governor*, 276 So. 2d 25 (Fla. 1973), this Court discussed the significance of maintaining the integrity of the selection process by eliminating the Governor's ability to control the applicants selected by the JNC. In that decision, Governor Askew sought

guidance regarding the then recent creation of the JNC process pursuant to Executive Order Number 71-40A, dated July 23, 1971 which later became instilled in our Florida Constitution through the 1973 Constitutional revision to Article V. Governor Askew requested the Court to consider whether his office had the inherent or implied authority to establish rules governing the operation of nominating commissions

The Court noted that the JNC is technically part of the executive branch of government and, as such, cannot be limited by legislative action. The Court further highlighted the importance of freeing the JNC from influence by the Governor. As the Court concluded:

> This appointive power is diluted by the Constitution to the extent that a nomination must be made by the appropriate commission, **unrestrained by the influence of the Governor**. **To allow the Governor to guide the deliberations of the commissions by imposing rules of procedure could destroy its constitutional independence**. This does not preclude him from making recommendations concerning rules.
>
> Seeking to remove some of the discretion of the Governor's office in the appointment of judicial officers is an apparent goal of the people which can best be attained by providing discretion to their commissions to promulgate rules of procedure for their hearings and findings, independent of any of the three standard recognized divisions of state government. While the function of the commissions is inherently executive in nature, **the mandate for the commissions comes from the people and the Constitution, not from the Legislature, the Governor, or the Courts.**

Id. at 30-31 (emphasis added).

Simply stated, just as the Governor does not have the power to enact rules dictating the selection process, the Governor is not authorized to encroach upon the Constitutional independence of the JNC by rejecting the names presented, requesting alternatives or simply declining to make an appointment. The Governor should be required to fulfill his mandatory duty to make a selection.

There is an equally compelling basis for the issuance of the writ. The Fifth District continues to operate with an unfilled vacancy. The fact that this vacancy remains unfilled, many months into this process severely undermines the orderly administration of justice for all litigants within that district. The issuance of the writ will ensure that this process is brought to a close and the vacancy is filled.

II. THE APPELLATE PRACTICE SECTION FULLY SUPPORTS THE GOAL OF FOSTERING DIVERSITY AMONG THE FLORIDA JUDICIARY, BUT THAT LAUDABLE GOAL IS SEPARATE FROM THE LEGAL ISSUE OF WHETHER FLORIDA CONSTITUTIONAL MANDATE SUPPORTS THIS WRIT OF MANDAMUS, AND EVEN ASSUMING DIVERSITY WERE AN ISSUE, THE DENIAL OF THE WRIT WOULD HINDER, NOT SERVE, THAT GOAL.

The Section commends the Governor for his goal of ensuring that the nominees selected by the judicial nominating commissions throughout Florida are not only the most qualified, but also that the nominees are reflective of the diversity of this state. But this case has nothing to do with promoting diversity and everything to do with following the Florida Constitution.

The Constitution outlines a process that balances politics with the need to ensure high quality candidates for the appellate bench. The process ensures that the Governor will select from a pool of nominees that the JNC presents in accordance with the Florida Constitution and law. The Governor appoints the members of a JNC which then makes its nominations unfettered by partisan influence. The Governor then chooses from this pool of qualified candidates. If the Governor is given unfettered power to reject a slate or simply do nothing, that process is subverted. Even if the Governor has laudable reasons for doing so, a future Governor could just as easily abuse that power. For example, a future Governor could just as easily reject a pool of nominees that he or she believes contains **too many** minorities.

In other words, allowing the Governor to bypass the restraints otherwise set forth in our Constitution would materially erode, if not destroy, the integrity of the judicial selection process and could undermine the very goal that the Governor and the Appellate Practice Section share: the goal of **promoting** diversity of all kinds. The Florida Constitution maintains an appropriate check and balance and ensures that the Governor will select from nominees presented by the JNC and, in so doing,

eliminates the Governor's ability to dominate the process – even if for laudable reasons, such as those expressed by the Honorable Governor Crist.[1]

The Section supports Judge Pleus' Petition for a Writ of Mandamus because the selection process preserves the integrity of both nominations by the JNC and appointments by the Governor. It strikes a critical balance that will be lost if the Governor can, despite Constitutional mandate, simply decline to make an appointment. This is particularly important where, as here, a Court needs to fill a judicial vacancy to maintain its daily operations. Although Governor Crist's motivation and aspirations to promote racial diversity are commendable, the authority he seeks to exercise is contrary to the plain language of our Constitution and could just as easily be used for more nefarious purposes by future governors. Our constitutional checks recognize that "[n]o man is wise enough, nor good enough to be trusted with unlimited power." Charles Caleb Colton. This Court should issue the writ and restore the balance dictated by the Florida Constitution.

[1] Both concerns appear grounded in statistics. Although none of the six nominees are identified as racial minorities, two are women. The Fifth District currently has nine active judges and four senior judges. Of those thirteen judges, only one (an active judge) is a woman and only one (a senior judge) is African-American.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should grant the petition for writ of mandamus and direct the Respondent to appoint a judge to the Fifth District Court of Appeal from the list certified by the JNC in accordance with Article V of the Florida Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **Talbot D'Alemberte, Esq.**, 1117 Myers Park Drive, Tallahassee, Florida 32301, attorney for Petitioner Robert J. Pleus, Jr., and **Jason Gonzalez, Esq.**, General Counsel, Executive Office of the Governor, 400 S. Monroe Street, Room 209, Tallahassee, Florida 32399, attorney for Respondent Governor Charles Crist, by U.S. mail this __ day of April, 2009.

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Of Counsel

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief uses Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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Of Counsel