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IN THE SUPREME COURT OF FLORIDA

ROBERT J. PLEUS, JR.,

Petitioner,

v. Case No. SC09-565

HON. CHARLES CRIST,
GOVERNOR,

Respondent.
_______________________________/

ON ORGINAL PETITION FOR WRIT OF MANDAMUS

**PETITIONER'S REPLY
TO RESPONDENT**

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INTRODUCTION

This petition is filed by Senior Judge Robert Pleus, who gave the Respondent timely notice in early September 2008 that he would retire in January 2009. Despite diligent effort by the Judicial Nominating Commission for the Fifth District Court of Appeal, the vacancy remains unfilled and Judge Pleus has been obliged to continue the Court's work.

Judge Pleus has consulted with his colleagues on the Fifth District Court of Appeal, which has authorized him and his counsel to represent to this Court that the Fifth District Court of Appeal agrees with the position of Judge Pleus and is willing to intervene in this action if necessary for the Court to grant complete relief on the merits.

SUMMARY OF ARGUMENT

The Petitioner seeks to enforce a clear legal obligation that is stated in the Constitution of Florida: "Whenever a vacancy occurs in a judicial office, …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." Article V, Section 11, Constitution of Florida (emphasis added).

This submission addresses the arguments of the Respondent, which appear to rest on the following propositions (each addressed in the parenthetical material following the proposition):

a) That the Petitioner is without authority to bring this action. (Addressed in Point I.A: The Respondent does not challenge standing and even concedes that modern authority favors the Petitioner.)

b) That "no one can claim a clear and certain legal right to compel a Florida governor to perform any function, or, at the very least, a function that a governor has not been compelled to perform in the past." (Page 11 of Response). (Addressed in Point I.A: This sweeping assertion of a Governor's immunity from remedy is untenable under our Separation of Powers principles and would have the effect of removing the Governor's actions from judicial scrutiny.)

c) That, despite the provisions of Article V, Section 11, the Governor retains the full measure of executive discretion. (Addressed in Point I.B: As the history of Article V shows, the very purpose of the Judicial Nominating Commission (JNC) procedure is to provide for a screening process removed from the Governor's power.)

d) That the Governor, having ignored the clear language of the Florida Constitution that requires selection of a judge from the list of nominees within sixty days, may not be compelled because the sixty days has expired. (Addressed

in Point I.C: The case can only be brought after the time has expired. The Governor's argument would read a mandatory constitutional duty out of the Constitution.)

e) That enforcement of the word "shall," relating to the requirement for appointment, will produce absurd results. (Addressed in Point I.D: The hypotheticals used by the Governor do not relate to the facts of this case.)

f) That a hypothetical commission, acting for "nefarious reasons," could limit a Governor's authority. (Addressed in Point I.D: The Governor's authority is limited by the Florida Constitution and, as the Respondent's own submission demonstrates, there are remedies for a corrupt commission.)

Point I, below, makes four points:

* Mandamus is the proper remedy;

* The Governor's Authority is limited by the JNCs;

* The remedy for the Governor's failure to adhere to a Constitutional mandate can be taken only after the time allowed for his performance expires; and

• Hypothetical abuses by a JNC do not provide a basis to ignore the Florida Constitution's clear mandate, especially because adequate remedies exist should some JNC act for "nefarious reasons."

Point II demonstrates that there is a need for early action in this case.

ARGUMENT

I.

THE PETITION SEEKS COMPLIANCE WITH A CLEAR LEGAL DUTY UNDER ARTICLE V, SECTION 11, CONSTITUTION OF FLORIDA.

This case involves Article V, Section 11, Constitution of Florida:

> (a) Whenever a vacancy occurs in a judicial office to which 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.
>
> * * *
>
> (c) . . . The governor *shall* make the appointment within sixty days after the nominations have been certified to the governor.
>
> (Emphasis added.)

A. Mandamus is the proper remedy.

The Response begins with a quotation regarding the Writ of Mandamus: "Mandamus is a harsh and extraordinary remedy," and then cites two modern Supreme Court cases where mandamus was granted.[1]

One, *Hatten v. State,* 561 So. 2d 562 (Fla. 1990), related to a petition to require the Public Defender to deal with a defendant's right to appeal or withdraw.

The other, *Brown v. Firestone*, 382 So. 2d 654 (Fla. 1980), involved the Governor's authority to veto language in an appropriations bill. In that opinion,

[1] Respondent also cites to several older cases where mandamus was denied or quashed.

Justice Sundberg dealt directly with the issue of extraordinary writ jurisdiction in such a case. Citing several cases[2], Justice Sundberg underscored the importance of using extraordinary writ authority when failure to act threatens the functions or functioning of government:

> As to the propriety of entertaining this cause as a matter of original jurisdiction, the Court on two recent occasions has held mandamus to be a proper vehicle to challenge the constitutionality of provisions in a general appropriations act. . . . We granted a peremptory writ of mandamus and found the proviso unconstitutional without considering the propriety of the governor's veto. *In both cases we held mandamus to be the appropriate remedy because the functions of government would have been adversely affected without an immediate determination*. . . . [W]e are obliged to conclude that the case now before us also requires an immediate determination.

Brown, 382 So. 2d at 662 (emphasis added).

The Petitioner concedes that some archaic authority exists which could present barriers to this Petition, but submits that *all* modern authority supports the Petitioner on this issue,[3] and expresses appreciation for the Respondent's candor in recognizing this modern authority.[4]

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[2] *Department of Administration v. Horne,* 269 So. 2d 659 (Fla. 1972); *Dickinson v. Stone*, 251 So. 2d 268 (Fla. 1971); and *Division of Bond Finance v. Smathers*, 337 So. 2d 805 (Fla. 1976).

[3] The Petitioner notes that the Court has, on occasion, used its "all writs" power to resolve important issues of Constitutional law. See, *Pettigrew v. Kirk*, 243 So. 2d 147 (Fla. 1970). Petitioner and Petitioner's counsel in that case were among the people who drafted and submitted the 1972 revision of Article V. As drafters, they believed that the Governor is subject to extraordinary writs. The Petitioner does

A component of the Governor's Response is the suggestion that Petitioner's remedy lies in Declaratory Judgment, but that route presents two major problems: 1) The Petitioner cannot honestly allege doubt about the clear provisions of the Constitution, and 2) the lengthy litigation route through trial and appellate courts would not address the exceptional circumstances of this case where the Governor has refused to follow a Constitutional mandate.

B. <u>This case deals with the authority of the judicial nominating commissions and does not implicate the Governor's undoubted interest in diversity.</u>

Petitioner does not contest the Governor's contention that there has been a lack of diversity on Florida Courts.[5] Instead, the Petitioner argues for the integrity of the judicial nominating process that has, over the years, contributed to greater diversity on the bench. The Petitioner acknowledges the arguments of the Central

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not rely on the "all writs" jurisdiction, itself a practice that has been abandoned over time.

[4] Page 7 of Governor's Response: "The Court has stated in recent decisions, without analysis, that this provision [Article V , Section 3 (b)(8)] provides the Court with jurisdiction to issue writs of mandamus to the governor." (Citations omitted.)

[5] The Response's "Background" section (page 1) begins with a citation to Section 43.291(4), Florida Statutes. That section has no relevance to the issues in this case, but it is interesting to note that the statute imposes on the Governor the responsibility to "ensure" that membership on the nominating commissions reflects the "racial, ethnic and gender diversity" of the population. This is a sensible starting place for a Governor who seeks diversity, and the Governor may want to look more closely at that strategy.

Florida Association of Women Lawyers and the Florida Chapter of the NAACP with appreciation for the important policy arguments in favor of diversity made in those amici briefs.[6]

The Petitioner also acknowledges the role of Florida's political leaders, including the Respondent, who have brought greater diversity to our courts.

One of those leaders who succeeded in bringing diversity to the judiciary was Governor Reubin Askew, who was also the person responsible for setting up the original JNCs through executive order, thus giving up what was then his sole authority to name judges. As one close observer of Florida government has written: "Askew had abdicated the governor's traditional power to appoint friends to judgeships. Instead, he established nominating commissions to recommend candidates. Significantly, he could not control the nominating commissions."[7] This step led to the 1972 constitutional provision incorporating the JNC process.

A particular incident in the Askew tenure relates to the circumstances of Joseph W. Hatchett's appointment to the Florida Supreme Court in 1975. At that time, Article V, Section 11, of the Florida Constitution still contained the original

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[6] To the extent that the Governor's Response and the NAACP brief can be read to suggest that there might have been some impropriety by the JNC, such implication is without any record basis, and the Petitioner rejects the suggestion. Petitioner is also unable to agree with the statistical analysis put forward by the NAACP.

[7] See, article by Martin Dyckman, "Crist's Court," *St. Petersburg Times*, June 2, 2008. http://www.tampabay.com/opinion/essays/article549991.ece.

language from the 1972 judicial article amendment, reading: "The governor shall fill each vacancy in judicial office by appointing . . . one of not fewer than three persons nominated by the appropriate judicial nominating commission."

Governor Askew had already appointed Ben Overton and Alan Sundberg to the high court, selecting them from two lists of only three names each, which included no minorities or women. When a third vacancy occurred, the Governor's Office asked the Supreme Court JNC to send a list that would allow diversity. The Commission responded with a list of seven names, including that of then-U.S. Magistrate Hatchett.[8] Out of that process, Justice Hatchett became the first African-American to serve on the Florida Supreme Court.

Governor Askew's actions were historic, and also wise. He did not direct the JNC to select any certain persons, but merely indicated -- before receiving the list -- that it should provide an opportunity for him to appoint a woman or a minority.[9] That way, he did not intrude into the independence of the JNC.

This episode might provide a precedent for Governor Crist except for one thing: After Justice Hatchett's appointment, the Legislature proposed an

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[8] See Martin Dyckman, "Askew Expected to Name New Justice Today," *St. Petersburg Times*, July 3, 1975, page 12.

[9] In this instance, Governor Crist was not specific about his interest in minorities until after the JNC had done its work. We do not know if an earlier announcement would have broadened the applicant pool or led commission members to a different conclusion.

amendment to Article V, Section 11, that was adopted, limiting the JNCs to no more than six nominees for each vacancy. Thus, the Respondent is wrong in asserting that Article V, Section 11, is "materially unchanged since the section was originally added to the constitution…" (Response, page 3.) In fact, this is precisely the problem.

Once a JNC has nominated six persons, it is without authority to do more. Indeed, since the constitutional limit on nominees is now set at six, a JNC cannot, absent evidence of corrupt activity, add more names without removing some names from the list of lawyers or judges it originally determined to be the six best-qualified applicants.

Because a constitutional provision is being considered, it is important to think about the implications of the Governor's position in constitutional terms: The thrust of Article V, Section 11, is to remove from the Governor the unbridled power to make any judicial appointment the Governor favors. The Governor has only the power to appoint from the list presented.

We can concede Governor Crist's good motivations and still conceive of a Governor with less noble instincts. Some examples:

Given the fact that most law students are now women, it is not hard to envision a future JNC that nominates six women. If a Governor felt there were too

many women on the list, under the radical principle suggested by the Respondent, that Governor would have authority to dictate a different list to the JNC.

It is equally possible to conceive of a Governor at odds with the judiciary, who decides to simply refrain from making *any* judicial appointments, thus depriving one or more courts of the personnel necessary to function.

The essential point is that the Florida Constitution now restricts the unhampered discretion that existed before Governor Askew promulgated his idealistic executive order.

The Constitution places on each JNC the duty to review those who apply and, from that list, to nominate three to six persons. The JNC should consider all factors (including diversity) and select no more than six that the JNC considers best qualified. Section 43.291, Florida Statutes. Here, the JNC for the Fifth District has fulfilled this obligation and reported specifically that it considered diversity. Nothing in the record suggests otherwise.

The Governor is now without authority to dictate to the JNC.

C. <u>The remedy for the Governor's failure to adhere to the Constitutional mandate can be taken only after the time allowed for his performance expires.</u>

One of the Respondent's novel arguments is that the Governor, having ignored the plainly stated time requirements of the Constitution, may not be compelled to make an appointment after the time has expired. The Response, page

17, suggests that requiring the Governor to comply with the Constitution will somehow render the provisions of the Constitution "essentially meaningless."

Where the Constitution tells us that a Governor "shall" perform an act, it is difficult to understand why an order directing that he perform the act renders the Constitution meaningless.

This argument leads to the conclusion (urged in several ways) that the Governor's disregard for the Constitution cannot be the subject of a judicial remedy.

The Florida Constitution allows the Governor sixty days to make the appointment from the list of nominees, and no action will lie during those sixty days. In this case, the Petitioner and the Fifth District Court of Appeal sought performance by the Governor's office for several months before instituting action. Those efforts failed.

D. The Respondent's hypotheticals do not provide a basis to ignore the clear mandate of the Constitution, especially because there are adequate remedies if a JNC should act for "nefarious reasons."

The Respondent's argues that a ruling for Petitioner will "yield absurd consequences." (Response, page 18.) The Respondent's illustrations show imagination, but not an appreciation of JNC dynamics. First, the Governor has enormous power over the membership of the JNCs. Second, the commissions operate with a degree of transparency quite beyond that in existence four decades

ago when a Governor could simply consult his political allies and make the appointment. The very fact that the decision on nominees now is made by a group rather than an individual gives considerable practical protection against the types of activity conjured up in the Response.

If members of the JNC should be guilty of "malfeasance" as suggested by Respondent (page 20), or act for "nefarious reasons" (page 19), or embark on any of the corrupt activity suggested in the Response, the Governor has power of suspension and removal under Article IV, Section 7, Constitution of Florida. The Respondent acknowledges that power but suggests that, if mandamus is granted in this case, it would somehow have to be granted because there had been foul play. A list produced through a corrupt process is a void list.

Requiring the Governor to adhere to the Constitution where there is not even a hint of malfeasance or nefarious conduct hardly destroys the Constitutional arrangements.

Should any of the situations envisioned by the Governor ever arise, the Court in such cases could simply refuse to issue a writ of mandamus. In the absence of some exceptional set of facts, the Governor is obligated to make the judicial appointment from the list submitted.

II.

THIS MATTER SHOULD BE PROMPTLY RESOLVED SO THAT THE JUDICIAL POST, NOW VACANT FOR ALMOST FOUR MONTHS, CAN BE FILLED.

The Respondent frequently asserts argument about the intention of the drafters of Article V, yet the Response ignores the importance given by those drafters to the issue of adequate judicial resources. This is evident in the history of the 1972 revision of Article V, where the Legislature was attempting to escape from the old provision setting up one circuit judge for every 50,000 Floridians.

This motivation is also revealed in the drafting of Article V to allow the creation of judgeships as necessary and even in the unique provisions of Article V, Section 9 ("Determination of number of judges"), which sets up a novel procedure to assure that issues of judicial resources are raised.

Although this Court has not often dealt with the JNC process, it has expressed itself on the issue of judicial vacancies. *In re Advisory Opinion to the Governor (Judicial Vacancies)*, 600 So. 2d 460 (Fla. 1992), brought to the Court issues relating to a judicial vacancy and, in rendering its opinion, the Court stated:

> Vacancies in office are to be avoided whenever possible. We are confident that the framers of article V intended that the nominating and appointment process would be conducted in such a way as to

> avoid or at least minimize the time that vacancies exist. *Judges are encouraged to and do submit their resignations, to be effective in the future, at a time that permits the process to proceed in an orderly manner and keep the position filled.*
>
> *Id.* at 462 (emphasis added).

Here, Judge Pleus submitted his resignation on September 2, 2008, and was thanked by the Governor. The Fifth District JNC did its work promptly. It only remains for the Governor to fulfill his responsibility under the Constitution.

CONCLUSION

The Respondent's extravagant claim of immunity from any judicial oversight raises important questions. If mandamus cannot reach the Governor, does this doctrine also foreclose writs of prohibition and quo warranto?

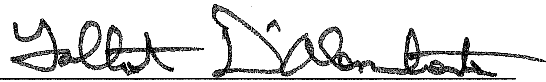
If there is no remedy, what happens to the Constitution? Surely, the Governor does not intend to operate entirely above the law.

Equally troubling is the claim of a right to direct the operation of judicial nominating commissions. Although the Governor already has vast power over the membership of the nominating commissions, the claim of Respondent is that he should be able to displace their judgment. In effect, this position renders the nominating commission process a nullity.

To avoid the displacement of the JNC process by a Governor's assertion of control over names submitted, and to assure the completion of a constitutional

process, the Petitioner respectfully requests the Court to issue the Writ of Mandamus.

Respectfully submitted,



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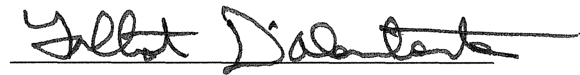
CERTIFICATES OF SERVICE AND COMLIANCE

I hereby certify that a copy of the foregoing Reply to Respondent has been furnished by U.S. Mail and by electronic transmission on April 28, 2009, to all parties of record. I also hereby certify that this Reply to Respondent has been prepared using Times New Roman 14 point type.



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