

IN THE SUPREME COURT OF FLORIDA

JILL STRONG,

Petitioner,

v.

MATTHEW OCHS,

Respondent.

Case No. SC09-_____

District Court of Appeal Case No.
2D09-1020

PETITIONER'S JURISDICTIONAL BRIEF

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C. STATEMENT OF THE CASE AND FACTS

The opinion for which review is sought states “. . . an unambiguous local rule states that family law cases will be heard by judges assigned to the South County courthouse . . .”. It also includes the following language: “Apparently unaware of the order appointing [Judge Kimberly Bonner] as acting circuit judge. . .”.

Each of the responses filed by counsel for Respondent, Matthew Ochs (“Respondent”) and Twelfth Circuit Chief Judge Lee E. Haworth (“the Chief Judge”) in underlying Second District Court of Appeal Case No. 2D09-1020 included a document purporting to appoint County Judge Bonner as an acting circuit judge.

No such appointment order exists at either the Sarasota Clerk website (<http://www.clerk.co.sarasota.fl.us/oprapp/oprinq.asp>) or Twelfth Judicial Circuit website (<http://12circuit.state.fl.us/AbouttheCourts/AdministrativeOrders/tabid/114/Default.aspx>).

This is a circuit court family case. It originated in the South County Judicial District of Sarasota County (“South County”), a special judicial district of the Twelfth Judicial Circuit. Pursuant to Petitioner’s motion in April, 2008, Presiding South County Circuit Court Judge Robert H. Bennett (“the Presiding South County Circuit Court Judge”) was disqualified.

The case was reassigned to Judge Phyllis R. Galen, a county judge serving as an acting circuit judge pursuant to order recorded on December 19, 2007 in the Sarasota Official Records as Instrument No. 200718758.

On December 1, 2008, the Presiding South County Circuit Court Judge became the only circuit judge in South County, per Twelfth Judicial Circuit Administrative Order 2008-13.2. Section 9 of that order authorizes the transfer/reassignment of South County family cases to another circuit court division, upon a showing of good cause.

On February 3, 2009, Judge Galen disqualified herself on her own initiative.

On February 5th, the Chief Judge reassigned the case to Judge Bonner. Petitioner filed an objection to this reassignment on the bases of the different jurisdiction of circuit court judges and county court judges, and the good cause transfer/reassignment provision of Administrative Order 2008-13.2. Petitioner stated in her objection that she had another family case pending in circuit court, assigned to Division F-2.

On February 13th, after learning that Respondent planned to set a hearing on a motion for temporary relocation to Virginia with the parties' minor child, Petitioner filed a petition in Second District Court of Appeal ("the Second District") Case No. 2D09-1020 seeking to prohibit Judge Bonner from presiding,

and reassignment of the case to a circuit court judge by someone other than the Chief Judge or Presiding South County Circuit Court Judge.

The Chief Judge filed a response in Case No. 2D09-1020. He said that Twelfth Judicial Circuit Local Rule 8.7 and Administrative Order 2008-13.2 read together meant that when the Presiding South County Circuit Court Judge is disqualified, the matter is reassigned to the acting circuit judge unless good cause is shown to reassign it to a circuit division in North County. The Chief Judge added, “For the record, it is this procedure that is followed in any case where [the Presiding South County Circuit Court Judge] must be disqualified, and it is that procedure that was followed in this case.”

Following an initial *per curiam* denial of the petition, the Second District granted Petitioner’s motion to vacate and for rehearing, and dismissed it via opinion in *Strong v. Ochs*, --- So.3d ----, 2009 WL 1491448, 34 Fla. L. Weekly D1092 (Fla. 2d DCA May 29, 2009) (“the *Strong* opinion”), included in the appendix filed contemporaneously herewith.

The Second District instead could have transferred the petition to this Court. *See Kaweblum v. Thornhill Estates Homeowner’s Association, Inc.*, 755 So.2d 85 (Fla. 2000) [mandatory per art. V, § 2(a), Fla. Const. and Fla. R. App. P. 9.040(b) and (c) that receiving court of cause improperly filed there transfer cause to proper court]; and *Bush v. State*, 945 So.2d 1207 (Fla. 2006) (cause generally should not be dismissed because of technical flaw in filing site if flaw readily remediable by court).

D. SUMMARY OF THE ARGUMENT

The Court should exercise its jurisdiction because the decision below expressly and directly conflicts with *Payret v. Adams*, 500 So.2d 136 (Fla. 1986) as to the temporary appointment of a county court judge to a circuit court case based on a specially created geographic district within a judicial circuit.

The issue of temporary judicial assignments is ongoing and without clear parameters or guidelines. See Justice Anstead's special concurrence in *Wallace v. State*, 609 So.2d 64, 65 (Fla. 4th DCA 1992), and Justice Kogan's partial concurrence and partial dissent in *Wild v. Dozier*, 672 So.2d 16 (Fla. 1996).

Examples of the kinds of issues entailed by temporary judicial assignment orders include:

- Perpetual successive rollover six-month orders which simultaneously and/or generically, without qualification (i.e., simply when deemed necessary or useful), assign all circuit court judges as acting county judges, and all county judges as acting circuit judges;
- The location/accessibility of temporary assignment orders; and
- The application of provisos which for good cause authorize the transfer/reassignment of a circuit court case from one circuit court division to other another, vis-à-vis assignment of the case to a county court judge as an acting circuit judge.

E. jurisdictional statement

The Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly affects a class of constitutional or state officers, or expressly and directly conflicts with a decision of the Court on the same question of law. *See* Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iii) & (iv).

First, this case has to do with the nature of assignment of a county court judge to a circuit court case. Judges are a class of a class of constitutional or state officers. *See Chief Judge of the Eighth Judicial Circuit v. Board of County Commissioners*, 401 So.2d 1330 (Fla. 1981).

Second, the subject opinion conflicts with the decision in *Payret v. Adams*, 500 So.2d 136 (Fla. 1986).

F. ARGUMENT

The Court should exercise its jurisdiction because the decision below expressly and directly conflicts with *Payret v. Adams*, 500 So.2d 136 (Fla. 1986) as to the temporary appointment of a county court judge to a circuit court case based on a specially created geographic district within a judicial circuit.

A county judge can not become a permanent circuit judge by administrative order in lieu of the method mandated by the constitution, regardless of any geographic convenience to citizens. *Payret v. Adams*, 500 So.2d 136, 139 (Fla. 1986). The issue in *Payret* was the temporal nature of the assignment of a county court judge who per administrative order had been annually reassigned for five years as the acting circuit court judge and for all practical purposes, was the circuit judge for the Glades district. This geographically defined district within the Fifteenth Judicial Circuit was created by administrative order. The petitioner in *Payret* was a felony-charged defendant set for trial before the acting circuit court judge. Pursuant to another administrative order providing that a party could have a case transferred to an appropriate division of the circuit court upon a showing of good cause, the petitioner moved to transfer the case to an appropriate division of the circuit court based on the county judge's nontemporary assignment as an acting circuit court judge. The acting circuit court judge denied the motion. The Court held that a county judge could not be indefinitely assigned circuit court duties in a specially created jury district.

A county judge can be assigned to spend a portion of time performing circuit court work, but the assignment cannot usurp, supplant, or effectively deprive circuit court jurisdiction of a particular type of case on a permanent basis. *Wild v. Dozier*, 672 So.2d 16, 19 (Fla. 1996). Factors to be considered include the duration of the assignment, any successive nature of it, the type of case covered, and the practical effect of the assignment on circuit court jurisdiction over a particular type of case. Successive and repetitive assignments that when considered individually might be facially valid are not considered temporary when the practical effect is to create a de facto permanent circuit judge by administrative order. *Payret*, 500 So.2d at 138; *Wild*, 672 So.2d at 19.

Like *Payret*, this case involves a delimited geographic district within a judicial circuit. There is an administrative order providing for transfer/reassignment of a South County circuit court case to another circuit court division, upon a showing of good cause. Petitioner stated in her objection filed in the circuit court in this case, that she had another family case pending in a different circuit court division. The *Strong* opinion decided, however, that South County “family law cases will be heard by judges assigned to the South County courthouse . . .”

This means that any time the Presiding South County Circuit Court Judge is disqualified in a circuit court family case, rather than transfer it to another circuit

court division, the case will be heard by the county judge assigned to South County. That county judge effectually becomes the permanent circuit judge for such cases. This is not aiding or assisting another circuit court judge. It is replacing. It usurps the jurisdiction of the circuit court and is exactly what is prohibited by *Payret*. Jurisdiction is not determined by geographic location.

Additionally, the decision below mentioned that Petitioner was “[a]pparently unaware of the order appointing [Judge Bonner] as acting circuit judge. . . ,” in discussing the propriety of the assignment.

Although a document purporting to appoint Judge Bonner as acting circuit judge was filed in the underlying case by both Respondent and the Chief Judge, no such order exists at either the Sarasota Clerk website (<http://www.clerk.co.sarasota.fl.us/oprapp/oprinq.asp>) or Twelfth Judicial Circuit website (<http://12circuit.state.fl.us/AbouttheCourts/AdministrativeOrders/tabid/114/Default.aspx>). *See* Fla. R. Jud. Admin. 2.120(c) and 2.215(e)(3) (defining administrative orders, and requiring indexing and recording of those of a general and continuing nature). Respectfully, by virtue of the lack of a valid underlying temporary appointment order, the assignment of this circuit court family case to County Judge Bonner was not proper.

G. CONCLUSION

For all of the above reasons, it is respectfully requested that the Court exercise its discretion and grant review of the Second District's decision in 2D09-1020.

H. CERTIFICATE OF SERVICE

_____ I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail this ____ day of July, 2009 to:

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**I. CERTIFICATE OF COMPLIANCE REGARDING
TYPE SIZE AND STYLE**

In accordance with Florida Rule of Appellate Procedure 9.210(a)(2), I hereby certify that this brief was prepared in Times New Roman 14 type.

SUSAN HARTMANN SWARTZ