

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC 06-668

IN RE: ADVISORY OPINION
TO THE GOVERNOR

RE: SHERIFF AND JUDICIAL
VACANCIES DUE TO
RESIGNATIONS

INITIAL BRIEF OF JACK E. HOLT, III,
AN INTERESTED PARTY OR,
IN THE ALTERNATIVE, AS AMICUS CURIAE

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PRELIMINARY STATEMENT

Throughout this brief, the Appendix is referred to in the format (App. __).

This Court has jurisdiction over this case pursuant to Article IV, § 1(c), Florida Constitution (1998) and over candidates for judicial office under the Florida Bar Rules of Professional Responsibility. The undersigned attorney is filing this initial brief in an abundance of caution because the order of this Court dated Wednesday April 19, 2006 required briefs from interested parties to be filed by April 24, 2005. Although the undersigned was not copied on the order, candidates for allegedly vacant judicial seats have been treated as interested parties in previous cases. In re Advisory Opinion to the Governor re: Appointment or Election of Judges, 824 So. 2d 132, 133 (Fla. 2002). The undersigned has filed with the Division of Elections as a candidate for the Eighteenth Judicial Circuit, Group 12 but cannot file his qualifying fee until May 8, 2006. In addition, four fellow Florida Bar members have filed with the Division of Elections for this seat and presumably will also qualify by petition or payment on or around May 8, 2006.

STATEMENT OF CASE AND FACTS

The undersigned attorney, Jack E. Holt, III registered as a candidate with the Division of Elections for the State of Florida on March 17, 2006 in the race for Circuit Judge of the Eighteenth Judicial Circuit, Group 12, the seat held by the Honorable Gene R. Stephenson. (App. 5). Judge Stephenson's current six-year term is set to expire on January 2, 2007 but Judge Stephenson would not have been eligible to run for re-election because he had reached the mandatory retirement age during his term. On April 4, 2006, Judge Stephenson sent a letter to the Governor's office with a carbon copy to the Commission Issuance Section which read as follows:

I hereby *announce* my retirement from my position as Circuit Judge, 18th Circuit, effective May 31, 2006.

(App. 1)(emphasis added). The letter was received by the Governor's office on April 6, 2006. *Id.* On April 12, 2006, the Honorable Sue M. Cobb gave notice that Judge Stephenson's seat, Group 12, was vacant for the next general election scheduled on November 7, 2006. (App. 9, 13). On April 14, 2006, the Governor construed Judge Stephenson's announcement as a resignation and accepted it as a resignation on that date. (App. 9).

Currently, the undersigned and four other candidates are registered and have filed financial reports. (App. 2-6). The undersigned, and presumably the other

candidates intend to qualify between May 8, 2006 and May 12, 2006 as required by law. Moreover, one candidate Vicki Levy-Eskin had already submitted petition signatures for verification prior to the announcement of the general election in anticipation of being able to qualify as a candidate by petition. (App. 2) The Governor has asked for an Advisory Opinion on whether he is required to appoint a judge to fill the vacancy he believes has been created by Judge Stephenson's announcement or whether the general election should proceed to fill the upcoming vacancy. (App. 7-11). The Governor has also been kind enough to ask for an expedited opinion because of the quickly approaching qualifying dates. (App. 12).

This court granted the MOTION TO EXPEDITE on April 19, 2006 and ordered interested parties to file their briefs on or before April 24, 2006. The undersigned did not become aware of the Governor's request or this Court's order until after 3:00 p.m. on Friday, April 21, 2006; there has been no time to retain separate counsel.

SUMMARY OF ARGUMENT

In his letter dated April 4, 2006, the Honorable Gene R. Stephenson did not explicitly resign with a resignation date *in futuro* but only announced the prospective date of his retirement. It is possible that the Governor should not have construed the letter as a resignation or that he should not have accepted the letter as a resignation. If the letter was not a resignation, no vacancy has been created for the Governor to fill. Compare In re Advisory Opinion to the Governor (Judicial Vacancies), 600 So. 2d 460, 462 (Fla. 1992) (“When a letter of resignation to be effective at a later date is received and accepted by [the governor], a vacancy in that office occurs. . . .”); Spector v. Glisson, 305 So. 2d 777, 780-81 (Fla. 1974) (Justice Ervin’s resignation construed to be irrevocable even though made at a future date).

Even if the announcement of a retirement date is construed as a resignation, the Governor did not accept the resignation until after the announcement of the General Election and the registration of five candidates who can qualify for election on May 8, 2006. Previously, when a involuntary retirement occurred after the general election’s qualifying date, this Court followed the provisions of article V, § 10(b)(1), Florida Constitution (1998) and ruled that an election should be held. In re Advisory Opinion to the Governor re: Appointment or Election of Judges, 824 So. 2d 132, 136 (Fla. 2002). In the case of voluntary retirements

occurring after the qualifying date, this Court should apply the same rule and permit the candidates to qualify and an election to be held. In the alternative, this Court should hold that the election process actually commences when the election is noticed by the Division of Elections instead of the date on which the candidates must qualify.

ARGUMENT

Prior to 2002, it was clear that the Governor was required to appoint a judge to fill a vacancy when that vacancy in office occurred prior to any judicial candidate qualifying for the election. Pincket v. Harris, 765 So. 2d 284, 285 (Fla. 1st DCA 2000). If Judge Stephenson, in fact, resigned prior to any of the candidates qualifying, the rule in Pincket would require the Governor to exercise his constitutional powers to appoint a replacement for Judge Stephenson. It is possible that this Court's subsequent advisory opinion to the Governor in 2002 may have modified this rule.

THE HONORABLE GENE R. STEPHENSON'S LETTER ANNOUNCING HIS UPCOMING RETIREMENT MAY NOT HAVE CREATED A VACANCY THAT MUST BE FILLED BY AN APPOINTMENT OF THE GOVERNOR

The plain language of the letter sent by the Honorable Gene R. Stephenson does not indicate that he was offering his resignation to the Governor. (App. 1). First, Judge Stephenson nowhere used the word "resignation" or "resign". Secondly, he purported merely to "announce" an event that was already scheduled to occur, his retirement. Judge Stephenson reached the age of seventy (70) during his term of office and was no longer eligible for re-election. His announcement was based on the assumption that he would retire after candidates would qualify for office in early May.

Significantly, Judge Stephenson did not seek to resign early or ask the Governor to accept a resignation. He announced a date for his retirement only. The difference is more than mere semantics.

Judge Stephenson did not say he was tendering a resignation, he only announced an intent to retire. In fact, long before the letter to the Governor, Judge Stephenson had frequently announced this same intention to retire. The Governor could not have accepted one of these earlier public statements of Judge Stephenson's intent to retire, nor would they have served as any sort of estoppel to create a vacancy.

Under the Florida Statutes, announcement of retirement is not one of the grounds for finding that an office is vacant. § 114.01(1), Fla. Stat. (2005). Furthermore, applying ordinary definitions of words alone, an announcement of retirement is very different from tendering a resignation.¹ If we compare Judge

¹ Merriam-Webster's latest on-line edition gives the following definitions:

an·nounce, v.

1 : to make known publicly : PROCLAIM <announced the appointment>

2 a : to give notice of the arrival, presence, or readiness of <announce dinner> b : to indicate beforehand : FORETELL

3 : to serve as an announcer of

re·tire·ment, n.

1 a : an act of retiring : the state of being retired b : withdrawal from one's position or occupation or from active working life c : the age at which one normally retires <reaches retirement in May>

Stephenson's announcement of retirement with Judge Ervin's unequivocal statements in Spector v. Glisson, there is a distinct difference. Spector v. Glisson, 305 So. 2d 777, 780-81 (Fla. 1974) (Justice Ervin's resignation construed to be irrevocable and an estoppel even though made at a future date).

The Governor's duty to appoint a judge to fill a vacancy only arises after a vacancy occurs. Art. V, § 11(b), Fla. Const. (1998). A vacancy has been held to occur when a letter of resignation is sent to the Governor and has been accepted. In re Advisory Opinion to the Governor (Judicial Vacancies), 600 So. 2d 460, 462 (Fla. 1992) ("When a letter of resignation to be effective at a later date is received and accepted by [the governor], a vacancy in that office occurs. . . ."). The courts have also held that a resignation may be valid even if it is effective at a future date. Id.; Spector v. Glisson, 305 So. 2d at 780-81.

However, even under previous case law, without a resignation for the Governor to accept, a vacancy could not have occurred. Compare In re Advisory Opinion to the Governor, 600 So. 2d at 462. If Judge Stephenson did not resign but only announced his upcoming retirement, it is possible that no resignation occurred. If no resignation occurred it could not have been accepted by the Governor and no vacancy could have occurred. See also § 114.01(1), Fla. Stat. (2005).

In addition, Judge Stephenson's retirement will not occur until after the qualifying period for judicial candidates. Previously, this Court held that the Governor has no obligation to appoint a successor when retirement occurs after the qualifying period for a pending election. In re Advisory Opinion to the Governor re: Appointment or Election of Judges, 824 So. 2d 132, 136 (Fla. 2002). The voluntary retirement of Judge Stephenson will occur on May 31, 2006, after the qualifying period (unless Judge Stephenson resigns or dies in the interim). This is similar to the involuntary retirement of Judge Foster on May 30, 2002, after qualifying had occurred. Id.

Accordingly, the election already scheduled and announced by the Division of Elections should proceed.

EVEN IF JUDGE STEPHENSON'S
ANNOUNCEMENT OF RETIREMENT CREATED A
VACANCY, IT WAS NOT ACCEPTED BY THE
GOVERNOR UNTIL AFTER THE ELECTION
PROCESS HAD BEGUN AND THE PROVISIONS OF
ARTICLE V, § 10(b)(1), FLORIDA CONSTITUTION
(1998) REQUIRE THAT THE RIGHT TO ELECTION
BE PRESERVED

Even if the announcement of a retirement date is construed as a resignation, the Governor did not accept the resignation until after the announcement of the General Election and the registration of five candidates who can qualify for election on May 8, 2006. Previously, when a involuntary retirement occurred after the general election's qualifying date, this Court followed the provisions of article

V, § 10(b)(1), Florida Constitution (1998) and determined that an election should be held. In re Advisory Opinion to the Governor re: Appointment or Election of Judges, 824 So. 2d 132, 136 (Fla. 2002). The Court's opinion was purposely limited to the facts presented in 2002. However, the Court's rationale in 2002 applies with equal force to the present situation.

The 2002 case involved the same conflict between Article V, § 10(b)(2) and Article V, § 11(b) that is at issue in this case. This Court noted:

The election section expressly states that "the election of circuit judges shall be preserved" Article v, section 10(b)(3) required a referendum in the year 2000 to be placed before voters in each of Florida's twenty judicial circuits and sixty-seven counties concerning the method of selection of circuit and county judgeships. A majority of the voters within the territorial jurisdiction of each judicial circuit court. . . voted to retain the election of those judges instead of replacing the elective system with a merit-selection system. . . .

[W]e conclude that the conflict must be resolved by a construction which gives effect to the clear will of the voters that circuit and county judges be selected by election. We therefore answer your question by stating that upon the qualification of a candidate or candidates. . . , the election method of selection. . . takes precedence over and forecloses the Governor's constitutional authority and obligation . . .to fill a vacancy that occurs during the incumbent judge's term of office. *Once the election process begins* by candidates qualifying for the judge position, the election method is the method by which the judicial position should be filled.

Id. at 135-36 (emphasis added). In the instant case, the qualifying date has not yet occurred but the election *process* appears to have begun. In the instant case, the

Division of Elections has announced the upcoming vacancy which arose not because of a resignation but because Judge Stephenson could not qualify for re-election because of the mandatory retirement age. Five candidates are registered to run for the seat. The candidates have gathered money and signatures with which to qualify, but they have not yet done so because the official qualifying date has not yet occurred.

In the past, the court has looked only at whether candidates are qualified for the upcoming election as the proof that the election process has started. However, this assumption may no longer be true.

First, qualifying actually occurs over a period of time—between Noon on May 8 and Noon on May 12, 2006 for this general election. §§ 100.031 and 105.031(1), Fla. Stat. (2005). It is not a fixed date. Under the logic of this Court's 2002 advisory opinion, it is possible for the qualifying period to start but for a judge to resign before any candidate actually qualifies. Hypothetically, a judge could resign on May 8, effective immediately and have that resignation accepted by the Governor and end the election, *even though candidates may intend to qualify by noon on May 12, 2006.*

Logically, it may make more sense to recognize that the election *process* is officially commenced upon its announcement by the Division of Elections, which is always one fixed date. § 100.021, Fla. Stat. (2005)(Notice of general election

must be published during the thirty days prior to the beginning of the qualifying period). In this case, also, petitions were filed in accordance with section 99.095, Florida Statutes (2005), twenty-eight (28) days before the qualifying date.

Here, the Governor did not claim to have accepted a resignation until April 14, 2006 which was after the Division of Elections gave official notice that the seat was to be up for election and after petitions had been submitted. (App. 9, 13). Under the current election law, candidates already had declared before that date and all five candidates had appointed treasurers and gathered money or signatures in order to qualify. (App. 2-6).

The election is ready to go forward. A voluntary retirement occurring after the qualifying date should not end the election. This Court should apply the same reading of Article V, § 10(b), Florida Constitution (1998) which it did in 2002 and permit the candidates to qualify and the election to be held.

CONCLUSION

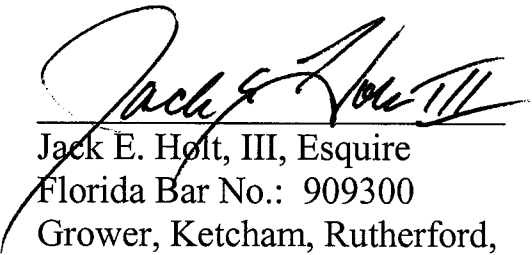
This Court should clarify what constitutes a resignation of a judge under Florida law and the precise date when the process of an election to fill a vacancy in a judicial office occurs. Prior to 2002, it was clear that the Governor was required to appoint a judge to fill a vacancy when that vacancy in office occurred prior to any judicial candidate qualifying for the election. Pincket v. Harris, 765 So. 2d 284, 285 (Fla. 1st DCA 2000). If Judge Stephenson, in fact, resigned prior to any

of the candidates qualifying, the rule in Pincket would require the Governor to exercise his constitutional powers to appoint a replacement for Judge Stephenson.

In the instant case, however, Judge Stephenson's letter does not tender a resignation *per se* but only announces his prospective retirement. He did not use the same unequivocal language as that used in previous resignation cases considered by this Court. Moreover, retirement is not one of the statutory criteria that creates a vacancy under Florida statutory law. § 114.01(1), Fla. Stat. (2005). Therefore, the Governor's duty to appoint a successor for Judge Stephenson has not been triggered and the election should proceed.

Furthermore, even if a resignation has occurred, this Court's earlier holding in 2002 strongly supports the right of the electorate to proceed to fill a vacancy "once the election *process* has begun." In re Advisory Opinion to the Governor re: Appointment or Election of Judges, 824 So. 2d 132, 136 (Fla. 2002)(emphasis added). Traditionally, the courts have looked only at the qualifying date to determine when the election process has begun. However, there are good policy reasons to hold that the election actually begins on one fixed date thirty days before the first qualifying date. To preserve the rights of the electorate, this Court may wish to clarify its earlier holdings on when the process of an election begins.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was served on the following parties via U.S. Mail delivery:

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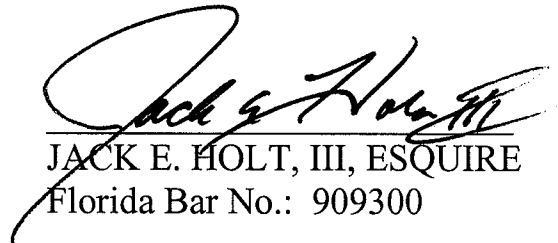
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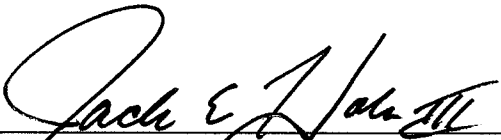
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.



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