

IN THE

**Supreme Court of Florida**

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**IN RE: Advisory Opinion to the  
Governor re: Appointment or  
Election of Judges**

Case Number: SC 08-844

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**INITIAL BRIEF  
of  
INTERESTED PARTIES**

**NINA ASHENAFI RICHARDSON and SEAN DESMOND**  
*Candidates for Leon County Court Judge, Seat 5*

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**Ronald G. Meyer, Esquire**  
Florida Bar No. 0148248  
**Janeia R. Daniels, Esquire**  
Florida Bar No. 0706841  
Meyer and Brooks, P.A.  
2544 Blair Stone Pines Drive (32301)  
Post Office Box 1547  
Tallahassee, Florida 32302  
[www.meyerandbrooks.com](http://www.meyerandbrooks.com)  
(850) 878-5212  
(850) 656-6750 - Facsimile

*Attorneys for Richardson*

**Robert A. Harper, III, Esquire**  
Florida Bar No. 0881791  
Harper and Harper Law Firm, P.A.  
325 West Park Avenue (32301)  
Post Office Box 10132  
Tallahassee, Florida 32302  
[www.harperlawfirm.com](http://www.harperlawfirm.com)  
(850) 224-5900  
(850) 224-9800 - Facsimile

*Attorneys for Desmond*

## TABLE OF CONTENTS

	Page No.
TABLE OF CITATIONS.....	ii
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF THE ARGUMENT .....	3
ARGUMENT .....	4
THE ELECTIVE PROCESS SHOULD BE UTILIZED TO PROVIDE THE SUCCESSOR TO LEON COUNTY JUDGE, SEAT 5, PURSUANT TO ARTICLE V, SECTION 10(b)(2), <i>FLORIDA CONSTITUTION</i> . ....	4
CONCLUSION .....	10
CERTIFICATE OF SERVICE .....	11
CERTIFICATE OF COMPLIANCE .....	12

## TABLE OF CITATIONS

<b>Cases</b>	<b>Pages No(s)</b>
<i>In re: Advisory Opinion to the Governor re: Appointment or Election of Judges,</i> 824 So. 2d 132 (Fla. 2002).....	6, 9
<i>In re: Advisory Opinion to the Governor re: Sheriff and Judicial Vacancies Due to Resignations,</i> 928 So. 2d 1218 (Fla. 2006).....	6, 7
<i>Judicial Nominating Commission, Ninth Circuit v. Graham,</i> 424 So. 2d 10, 11 (Fla. 1982).....	4
<i>Kainen v. Harris,</i> 769 So. 2d 1029 (Fla. 2000).....	9
<i>Pincket v. Harris,</i> 765 So. 2d 284 (Fla. 1st DCA 2000) .....	8
<i>State ex rel. Dade Co. v. Dickinson,</i> 230 So. 2d 130, 135 (Fla. 1970) .....	9
<i>State ex rel. West v. Gray,</i> 74 So. 2d 114 (Fla. 1954).....	9
 <b>Florida Statutes</b>	
Section 105.031(1) .....	2, 5
 <b>Other Authority</b>	
Article IX, Section 1(c), <i>Florida Constitution</i> .....	1
Article V, Section 10, <i>Florida Constitution</i> .....	3
Article V, Section 10(b)(2), <i>Florida Constitution</i> .....	4

## STATEMENT OF THE CASE AND FACTS

Pursuant to article IV, section 1(c), *Florida Constitution*, on May 5, 2008, the Governor of Florida requested this Court's opinion on a question of interpretation involving certain constitutional duties and powers with regard to a vacancy in Leon County Court Seat 5.

The question presented is occasioned by an order of this Court declaring incumbent Leon County Court Judge Timothy D. Harley to be involuntarily retired, effective midnight, April 30, 2008. At the time the order issued, Seat 5 was scheduled for election in the 2008 general election cycle.

The incumbent, Judge Harley, and three other candidates seeking election to the Leon County Judge Seat 5, began their quest for election several months ago. For example, Judge Harley established his campaign account by opening his campaign depository on February 27, 2008.<sup>1</sup> Judge Harley collected the signatures of 1,954 electors in Leon County who supported his bid for election (App. p. 2).

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<sup>1</sup> Attached to this Brief as an appendix is the affidavit of Supervisor of Elections, Ion Sancho, describing the acts undertaken in furtherance of the election process for the election of a candidate to the Leon County Judge Seat 5. The affidavit was prepared for and filed in proceedings pending in the Leon County Circuit Court (*Sancho v. Crist, et al*, Case No. 2008-CA-1422). Reference to the appendix will be made with the citation "App. p. \_\_\_\_" with the appropriate page number.

So, too, Nina Ashenafi Richardson opened her campaign account on February 20, 2008, and collected the signatures of 2,014 electors in Leon County in support of her candidacy (App. p. 1). Leonard Holton filed his statement of candidate form on April 28, 2008 (the initial date of the qualifying period), and Sean Desmond filed his statement of candidate form on April 29, 2008 (App. p. 3).

On April 5 and 19, 2008, the Secretary of State published legal notices announcing the election for Leon County Judge Seat 5 (App. p. 3).<sup>2</sup> At noon on Monday, April 28, 2008, the statutory qualifying period began and remained open through noon on Friday, May 2, 2008. *See* § 105.031(1), *Fla. Stat.* (2006). Candidates Richardson, Desmond and Holton each filed the remaining requisite paperwork on May 2, 2008, thereby qualifying as candidates for the election. Each had attempted to file their documents earlier but was refused the opportunity by the Supervisor of Elections (who subsequently reversed his position and accepted the filings) (App. pp. 2-3).

Despite the candidates having duly qualified for the judicial seat, the Governor noticed the Judicial Nominating Commission for the Second Judicial Circuit (JNC) of the existence of a vacancy caused by Judge Harley's retirement

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<sup>2</sup> Contrary to the concern expressed in the Governor's request for advisory opinion (Request for Advisory Opinion letter page 4), members of the Bar were not surprised or impaired in their efforts to seek judicial election.

and requested that the JNC initiate procedures to appoint his replacement. On May 1, 2008, the JNC issued a press release seeking applicants for the judgeship. Thus, both the election and appointment processes are underway to fill the same judicial seat.

By order dated May 6, 2008, this Court expressed its intent to exercise discretion to provide an opinion in response to the Governor's request and directed Interested Parties to file their briefs on or before May 12, 2008, and serve a copy on the Governor. Candidates Richardson and Desmond file the instant Brief pursuant to such order.

### **SUMMARY OF THE ARGUMENT**

The Leon County electorate should choose the individual who will assume the office of County Judge, Seat 5, pursuant to article V, section 10, *Florida Constitution*. Not only does the policy of the law afford the electorate priority in selecting trial judges, prior Court precedent requires that priority should be given to the elective process over the gubernatorial appointment power. On the underlying facts, the will of the people should be paramount, as envisioned by the *Florida Constitution*, and an election is the only appropriate remedy.

## ARGUMENT

### **THE ELECTIVE PROCESS SHOULD BE UTILIZED TO PROVIDE THE SUCCESSOR TO LEON COUNTY JUDGE, SEAT 5, PURSUANT TO ARTICLE V, SECTION 10(b)(2), *FLORIDA CONSTITUTION*.**

The citizens of Leon County should be permitted to elect the person who will serve as Leon County Judge, Seat 5. “We conclude that the constitution mandates an election when there is sufficient time to afford the electorate an opportunity to fill a judicial vacancy.” *Judicial Nominating Commission, Ninth Circuit v. Graham*, 424 So. 2d 10, 11 (Fla. 1982).

It has been long settled that the elective process is preferred when determining whether election or appointment is the appropriate vehicle for filling a vacancy of county court judges. Indeed, article V, section 10(b)(2), *Florida Constitution* expressly reserves the election process for county court judges. Art. V, § 10(b)(2), *Fla. Const.* (“The election of county court judges shall be preserved...”). The facts underlying the present request for an advisory opinion lead to the inescapable conclusion that the elective process should be utilized to fill Leon County Judge Seat 5.

The incumbent, Judge Harley, and three other candidates seeking election to the Leon County Judge Seat 5, established campaign accounts, mounted election campaigns, and in some instances began collecting petitions to be used for

qualifying, well in advance of the onset of the qualifying period, which began at noon on Monday, April 28, 2008, and remained open through noon on Friday, May 2, 2008. *See* § 105.031(1), *Fla. Stat.* (2006). Shortly before the beginning of the qualification period, Judge Harley announced that he would not seek re-election. Subsequently, by order, this Court declared Judge Harley to be involuntarily retired from judicial service as of midnight, Wednesday, April 30, 2008, precisely midway between the opening and closing of the statutory qualifying period.

Prior to the expiration of the qualifying period, on May 2, 2008, Richardson, Desmond and Holton each filed the remaining required paperwork formally qualifying them to run in the election for the judicial seat. Not only had the candidates stated their intent to run by actively pursuing qualification prior to Judge Harley's involuntary retirement, but the qualifying period for his judicial seat had already begun. Thus, the election process was underway.

There would be no question about the entitlement of the candidates to seek election to the judicial office had either of the three candidates qualified for the office prior to the effective date of Judge Harley's retirement (a day or two before their formal qualifications occurred), or if the qualifying period for his seat had not yet begun. However, as is true in this Court's earlier opinions, neither the Constitution nor relevant case law provides the answer to the precise question



presented here—whether a vacancy arising in the middle of the statutory qualifying period permits the election process to be frustrated in favor of permitting the Governor to appoint a successor judge. See *In re: Advisory Opinion to the Governor re: Appointment or Election of Judges*, 824 So. 2d 132 (Fla. 2002); *In re: Advisory Opinion to the Governor re: Sheriff and Judicial Vacancies Due to Resignations*, 928 So. 2d 1218 (Fla. 2006).

This Court has addressed factual circumstances which are close – but not exactly on point – to the circumstances extant in the instant matter. *In re: Advisory Opinion to the Governor re: Appointment or Election of Judges*, the case relied upon heavily by the Governor in the instant proceeding, looked to the fact that candidates had *already qualified* to run for office when a vacancy was created by the involuntary retirement of a sitting judge. 824 So. 2d at 135. The Court held: “Once the election process begins by candidates qualifying for the judge position, the election method is the method by which the judicial position is to be filled.” *Id.* at 136. The Court, noting that its holding “is limited to the circumstances described in [the Governor’s letter], i.e., where a candidate or candidates have already qualified during the statutory qualifications period, one of whom will fill the position by election,” did not address the question of whether it is the *act of qualifying* or the *beginning of the qualifying period* which signals the start of the

election process.

That open question was resolved, however, in *In re: Advisory Opinion to the Governor re: Sheriff and Judicial Vacancies Due to Resignations*, 928 So. 2d 1218 (Fla. 2006). Under the facts of that case, the Court noted that the “qualifying period” (and, accordingly, the “election process”) had not commenced at the time that a vacancy for judicial office arose. *Id.* at 1220. Accordingly, the Court determined that the Governor was free to make an appointment to fill the vacancy because the election process had not yet begun. *Id.* The Court made plain that the election process begins with the start of the statutory qualifying period, stating: “However, we conclude that establishing the statutory qualifying period as the start of the election process is consistent with our precedent.” *Id.* at 1220-21 (emphasis added). The Court also approved the language in its earlier advisory opinion that “the conflict [between the constitutional provisions addressing the election of judges and the appointment power of the Governor] 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.” *Id.* at 1220.

The instant case is distinguishable from *Pincket v. Harris*, 765 So. 2d 284 (Fla. 1st DCA 2000), on which the Governor relies in his request for advisory opinion. Unlike here, the qualification period in *Pincket* had not yet begun;

therefore, no person could possibly qualify for election at the time the judicial vacancy occurred. *Id.* at 284-85. Thus, the First District Court of Appeal's conclusion that the gubernatorial appointment process was appropriate should not apply in this case because here the qualifying period, in fact, did begin prior to the effective date of the vacancy. In the instant matter, the election process for which the candidates have qualified began, at the latest, at the onset of the statutory qualifying period, and an election has properly been scheduled for August 26, 2008.<sup>3</sup>

Any conflict between the constitutional provisions addressing the election of judges and the appointment power of the Governor must be resolved by a construction which gives effect to the clear will of the voters that county judges be selected by election. Accordingly, the goal should be to effectuate the intent of the

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<sup>3</sup> If necessary, a runoff election would be conducted during the general election on November 4, 2008.

people and to accomplish, rather than to thwart, the objective intended. *See State ex rel. Dade Co. v. Dickinson*, 230 So. 2d 130, 135 (Fla. 1970); *State ex rel. West v. Gray*, 74 So. 2d 114 (Fla. 1954). In 2000, a majority of the electorate within the territorial jurisdiction of each judicial circuit court and county court voted to retain the election of those judges. *See generally Kainen v. Harris*, 769 So. 2d 1029 (Fla. 2000). Thus, it can be said without question that the clear will of the voters is that circuit and county judges be selected by election, as opposed to gubernatorial appointment.

The Governor's stated concern about an asserted "protracted vacancy," *see* Request for Advisory Opinion letter of May 5, 2008, page 4, should not be relied upon to deny the electors of Leon County the opportunity to select the successor to County Judge Seat 5. A similar argument was made and rejected by this Court in light of the overarching preference for the election process in *In re: Advisory Opinion to the Governor re: Appointment or Election of Judges*, 824 So. 2d at 136.

The impact of the involuntary retirement of Judge Harley is neither unacknowledged nor unconsidered. However, the interests of the people will undoubtedly be protected by those county judges still presiding and through use of senior judges, as necessary. *See id.* ("In light of the hardship, the Chief Justice of this Court will endeavor to cover this deficiency with the use of senior judges

when requested to do so by the Chief Judge... .”). Admittedly, caseloads and responsibilities may temporarily increase, but the candidates contend that this is a small price to pay to ensure that the elective principles envisioned by the Constitution are preserved. Because sufficient time exists to afford the electorate an opportunity to fill the judicial vacancy during the regularly scheduled primary and general election process, this method should be given priority.

### **CONCLUSION**

Based on the foregoing, the Interested Parties respectfully request that this Court give effect to the clear will of the voters and find that the individual who shall assume Leon County Judge Seat 5 should be elected by the citizens of Leon County.

Respectfully submitted,

**MEYER AND BROOKS, P.A.**

2544 Blair Stone Pines Drive (32301)  
Post Office Box 1547  
Tallahassee, Florida 32302  
www.meyerandbrooks.com  
(850) 878-5212 – Telephone  
(850) 656-6750 – Facsimile

**HARPER AND HARPER  
LAW FIRM, P.A.**

325 West Park Avenue (32301)  
Post Office Box 10132  
Tallahassee, Florida 32302  
www.harperlawnfirm.com  
(850) 224-5900 – Telephone  
(850) 224-9800 – Facsimile

By:                     /s/                      
RONALD G. MEYER  
Florida Bar No. 0148248

By:                     /s/                      
ROBERT A. HARPER, III  
Florida Bar No. 881791

By:                     /s/                      
JANEIA R. DANIELS  
Florida Bar No. 0706841

**ATTORNEYS FOR RICHARDSON**

**ATTORNEYS FOR DESMOND**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by U.S. Mail on this 12th day of May, 2008, to: Robert Rivas, Esquire, Sachs & Sax, P.A., 310 West College Avenue, 3<sup>rd</sup> Floor, Tallahassee, Florida

32301; Richard M. Benham, Esquire, Law Office of Richard Benham, P.A., 2804 Remington Green Circle, Tallahassee, Florida 32308; Jason Gonzalez, General Counsel, Governor's Legal Affairs Office, Room 209, The Capitol, Tallahassee, Florida 32399; and Leonard Holton, 2360 Tuscavilla Road, Tallahassee, Florida 32312.

\_\_\_\_\_/s/\_\_\_\_\_  
ATTORNEY

**CERTIFICATE OF COMPLIANCE WITH FONT RULE**

I HEREBY CERTIFY that this brief uses font size Times New Roman 14 in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

\_\_\_\_\_/s/\_\_\_\_\_  
ATTORNEY