

IN THE SUPREME COURT OF FLORIDA  
Case No. SC08-844

IN RE: ADVISORY OPINION:  
APPOINTMENT OR ELECTION OF JUDGES

**Brief of Ion V. Sancho, Supervisor  
of Elections of Leon County**

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## **TABLE OF CONTENTS**

TABLE OF CITATIONS.....	iii
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF ARGUMENT .....	5
ARGUMENT .....	6
<b>I. THE JUSTICES SHOULD DECLINE THE GOVERNOR'S REQUEST FOR AN ADVISORY OPINION.....</b>	<b>6</b>
<b>II. IF THE JUSTICES RENDER AN ADVISORY OPINION, IT SHOULD RECOMMEND THAT JUDGE HARLEY'S REPLACEMENT BE ELECTED .....</b>	<b>11</b>
CONCLUSION .....	14
CERTIFICATES OF SERVICE AND FONT COMPLIANCE.....	15

NOTE: An Appendix is submitted with this brief. The Appendix is cited as App.-X at \_\_\_, where X refers to the tab number of the item in the Appendix.

## **TABLE OF CITATIONS**

### **Cases: Page No(s):**

<i>In re Advisory Opinion to the Governor,</i> 509 So. 2d 292 (Fla. 1987) (“ <i>Advisory Opinion of 1987</i> ”).....	6, 7, 10
<i>In re Advisory Opinion to Governor,</i> 388 So. 2d 554 (Fla. 1980).....	7
<i>In re Advisory Opinion to the Governor,</i> 113 So. 2d 703 (1959).....	6
<i>In re Opinions of the Justices,</i> 69 Fla. 632, 68 So. 851 (1915) .....	7
<i>Opinion of the Justices,</i> 447 So. 2d 1305 (Ala. 1984) .....	9
<i>Spector v. Glisson,</i> 305 So. 2d 777 (Fla. 1974) .....	12-13

### **Constitutional provisions: Page No(s):**

Art. I, § 1, Fla. Const.....	11
Art. IV, § 1(c), Fla. Const. ....	6
Art. V, § 11(b), Fla. Const. ....	6, 8, 11

### **Statutes: Page No(s):**

§ 99.095, Fla. Stat. (2007).....	3
§ 100.021, Fla. Stat. (2007).....	2
§ 105.031(1), Fla. Stat. (2007).....	8
§ 105.041(2), Fla. Stat. (2007).....	8
§ 105.051(1)(b), Fla. Stat. (2007) .....	8
§ 106.021(1), Fla. Stat. (2007).....	3

§ 106.023, Fla. Stat. (2007).....	3
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## **STATEMENT OF THE CASE AND FACTS**

The Governor's letter requesting an advisory opinion is incomplete and misleading. Contrary to the Governor's position, the election process was well underway when the Governor sought to initiate the process to use the appointment power, and the Governor's own actions interfered with the electoral process. Moreover, the Governor had previously declined to agree that he would seek an advisory opinion from the Justices, which necessitated that Ion Sancho, the Supervisor of Elections of Leon County, file a request for a declaratory judgment in Circuit Court. That process now being under way, it should be the preferred method of resolution of this controversy.

At 11:24 a.m. on Monday, May 5, 2008, Sancho filed a Complaint in the Second Judicial Circuit Court against Charlie Crist, in his official capacity as the Governor, and the Second Circuit Judicial Nominating Commission. App.-1. Sancho secured service of process within hours. App.-2-3. In the action, Sancho seeks (1) a declaratory judgment that the Constitution and statutes of Florida require that an election be held for Seat 5 of the Leon County Court; (2) a declaratory judgment that the Governor has no constitutional prerogative to appoint a replacement for Judge Harley under the circumstances; and (3) temporary and permanent injunctive relief (a) prohibiting the Governor from further attempts

to utilize the appointment mechanism to replace Judge Harley; (b) prohibiting the JNC from any further proceedings to seek, receive, and review the qualifications of potential appointments to Seat 5; and (c) requiring Sancho to proceed with the election of a candidate ultimately to be seated in Seat 5 of the Leon County Court. App.-1.

On Wednesday, May 7, 2008, two Seat 5 candidates, Nina Ashenafi Richardson (“Richardson”) and Sean T. Desmond (“Desmond”) (together, “Intervenors”), moved to intervene in the trial court proceedings. App.-4. They seek to be aligned in support of Sancho’s position. *Id.*

The trial court proceedings have been effectively stalled in light of the obvious questions raised by the Governor’s request for an advisory opinion. Nonetheless, the trial court record has begun to develop. On Thursday, May 8, 2008, Sancho filed an affidavit, App.-5, demonstrating that:

- The election process for Seat 5 was well underway prior to the week of qualifying. Pursuant to section 100.021 of Florida Statutes, the Secretary of State published legal notices of the election for Seat 5 on April 5 and April 19, 2008. Sancho’s official website included notice of the election and his informational notices to prospective candidates listed the seat as up for election.
- Between February and April, Richardson, Desmond, Judge Harley and

another candidate, Leonard Holton (“Holton”), had filed appointments of campaign treasurers and designations of campaign depositories pursuant to section 106.021(1) of Florida Statutes. This is the first step legally required to establish a campaign and qualify for placement on the ballot. In March, Richardson filed an appointment of a deputy campaign treasurer.

- Each of the candidates filed a “Statement of Candidate” pursuant to section 106.023.
- On March 31, 2008, Richardson submitted 2,014 petitions signed by electors of Leon County to qualify for election pursuant to section 99.095. On April 4, 2008, those petitions were determined sufficient to support qualification of Richardson’s candidacy without her payment of a filing fee. Likewise, Judge Harley submitted petitions sufficient to qualify without paying a filing fee.
- Richardson electronically submitted a campaign treasurer’s report for the period January 1, 2008 through March 31, 2008. This report reflects aggregate contributions of over \$24,000 from approximately 120 unique contributors. Judge Harley also electronically submitted a campaign treasurer’s report for the period.
- At midnight on April 30, 2008, Judge Harley’s retirement became effective. He did not qualify to run for reelection. On Friday, May 2, before the noon qualifying deadline, Richardson, Desmond and Holton all submitted the

remaining forms and certifications required to qualify as candidates, including the “Judicial Offices Loyalty Oath” and the “Full and Public Disclosure of Financial Interests.”

- Richardson, Desmond and Holton all had previously attempted to file qualifying papers. However, acting on advice from the office of the Governor’s General Counsel, Sancho thought he was legally obligated to decline to accept the submissions. Upon independent legal review, Sancho determined that there is no legal authority for the Supervisor of Elections to refuse the qualifying papers and advised the candidates that their qualifying papers would be accepted at any time before the qualifying deadline. Each of the candidates qualified to run for election before the qualifying period ended.

Judge Harley publicly first announced his intention not to seek reelection on Monday, April 28, 2008, a few hours after the window of time to qualify for election to his seat had opened. App.-6. On May 1, 2008, the day after Judge Harley’s retirement took effect, the JNC posted a notice seeking applicants to be appointed by the Governor to replace him. App.-7. The applications were required to be submitted by noon on Monday, May 12, 2008, and the JNC announced plans to meet that afternoon to select a short list of those candidates who would be interviewed.



It is imperative that this matter be resolved promptly. Sancho must begin designing the ballot on June 20, 2008. App.-5 (Exhibit 1 to Sancho Affidavit). If the contents of the ballot are not established by June 27, 2008, Sancho will have to create two sets of primary ballots, one set with the Seat 5 race and an alternate set without. App.-5 (Sancho Affidavit at ¶ 2)b.). The cost of such duplicate ballot creation would likely exceed \$100,000. *Id.* A delay in the resolution of this matter past July 14 would reduce the time available for absentee voters, including overseas voters, to receive and cast their ballots. *Id.* at ¶ 2)c.

### **SUMMARY OF THE ARGUMENT**

The Justices should decline to provide the Governor with an advisory opinion in deference to the adversarial proceeding that is now under way. Only in an adversary proceeding may the facts be properly developed. Many questions remain unanswered about the truth of this matter, as evidenced in part by the disparity between the Governor's framing of the question and the facts thus far established in the trial court. In addition, Sancho needs an enforceable court order, not an advisory opinion, to establish that he may, or may not, violate a ministerial duty to qualify candidates for Seat 5. Notably, his ministerial duty is prescribed primarily by statutes, not the Constitution, and an advisory opinion is supposed to be limited to the giving of legal advice about the interpretation of the Constitution,

not statutes, to the Governor, not to others.

If the Justices elect to give the Governor the advice he seeks, they should opine that the Constitution and statutes of Florida require that Seat 5 be filled by election in the circumstances of this case. The election process has begun and the Governor has not yet made an appointment to the seat. Therefore, Article V, Section 11(b) does not give the Governor the authority to make an appointment.

## **ARGUMENT**

### **I. THE JUSTICES SHOULD DECLINE THE GOVERNOR'S REQUEST FOR AN ADVISORY OPINION.**

The adversarial proceeding in the Circuit Court is better suited than this proceeding to make the decision at hand. The Supervisor of Elections of Leon County is proceeding to comply with a ministerial duty required of him primarily by statutes, not by the Constitution. Many of the facts remain unclear. Parties, both private and governmental, besides the Governor are affected. Under these circumstances, the Justices should defer to the trial court, where "such a test can best be accomplished in adversary proceedings appropriately briefed and buttressed by argument of counsel." *In re Advisory Opinion to the Governor*, 509 So. 2d 292, 301 (Fla. 1987) ("*Advisory Opinion of 1987*"), quoting *In re Advisory Opinion to the Governor*, 113 So. 2d 703, 705 (1959).

Article IV, section 1(c) “does not generally empower this Court to issue advisory opinions concerning the validity of statutes enacted by the legislature. Thus, we are without power to render an advisory opinion regarding your [the Governor’s] statutory, as opposed to your constitutional, powers and duties.” *Advisory Opinion of 1987*, 509 So. 2d at 301. From the foregoing, it follows that the Justices are without the power to give an advisory opinion to the Governor on whether Sancho must follow his statutory duties. *See also In re Opinions of the Justices*, 69 Fla. 632, 640, 68 So. 851, 852 (1915) (the constitutional provision on advisory opinions “does not authorize the justices of the Supreme Court to give to the Governor at his request an opinion *upon statutory enactments* affecting his executive powers and duties”) (emphasis added); *In re Advisory Opinion to Governor*, 388 So. 2d 554, 555-56 (Fla. 1980) (“the justices of this Court are without authority to render an advisory opinion regarding your responsibilities under the *statutory provisions* referred to in your request”) (emphasis added).

The rights and duties of private parties are involved as well. As pled in his lawsuit, Sancho needs an enforceable decision that compels him and the Intervenors to a particular course of conduct and that establishes the propriety of this course of conduct once and for all. They cannot achieve this result from an advisory opinion. *See Advisory Opinion of 1987* at 301 (“Nor does this provision

generally authorize this Court to resolve questions concerning the legal rights and obligations of private parties.”).

As Supervisor of Elections, Sancho has no authority to comply with the Governor’s demand not to place the qualified candidates on the ballot. Florida Statutes section 105.031(1) provides that “candidates for the office of county court judge shall qualify with the supervisor of elections of the county. . . . Any person other than a write-in candidate who qualifies within the time prescribed in this subsection shall be entitled to have his or her name printed on the ballot.” Section 105.041(2) mandates that the “names of candidates for election to each nonpartisan office shall be listed in alphabetical order” on the ballot. Section 105.051(1)(b) provides, “If two or more candidates, neither of whom is a write-in candidate, qualify for such an office [county court judge], the names of those candidates shall be placed on the ballot at the primary election.”

On the face of these statutes, it appears Sancho would breach a ministerial duty he owes to the candidates — not to mention the public — if he honors the Governor’s request that he not place the qualified candidates’ names on the primary ballot. The Governor’s position asks that the statutes be overridden by a constitutional provision that does not explicitly override them, but that only refers to what *he* — the Governor, not the Supervisor — is to do when there is a

“vacancy.” *See* Art. V, § 11(b), Fla. Const. There is no “vacancy” where candidates have qualified in due course to run for the seat.

Moreover, the Governor is inviting the Justices of this Court to render an advisory opinion not so much to the Governor as to the trial court on how to interpret the statutory provisions. The requested advisory opinion would, in effect, tell the trial court how to rule, thus bypassing the discovery process and the necessity for an independent finder of fact to evaluate evidence at a trial.

The Justices of this Court have never precisely ruled that it is inappropriate for an advisory opinion to be issued on a question when the very question is already in litigation between the very parties before this Court. However, the Supreme Court of Alabama has had this to say on the subject:

Whenever the questions posed in a request for an advisory opinion have been the subject of pending litigation, we have declined to issue an advisory opinion. . . . This policy of allowing the questions to be answered in the adversarial proceeding stems from the preference for using a process that allows all interested parties to have their day in court and an attempt to avoid prejudicing the rights of the litigants in the pending civil action. . . . Therefore, we decline to answer questions one through seven and question thirteen, because they are the subject of pending litigation.

*Opinion of the Justices*, 447 So. 2d 1305, 1307-08 (Ala. 1984) (citations omitted).

This Court should hold similarly for the same reasons.

The advisory opinion process provides no inherent mechanism to end the

proceedings in the Circuit Court. An advisory opinion does not remand this matter to the trial court for the entry of a final judgment, and should not, for the trial court may develop a factual record that differs from the assumptions the Governor has asked the Justices to apply in an advisory opinion. *Cf. Advisory Opinion of 1987* at 302 (“any interested parties are free to initiate lawsuits . . . and are free to argue that this advisory opinion has either been wrongly decided or that the act is unconstitutional as applied to their particular situations”).

The parties to the litigation have a good faith basis to proceed with discovery, for instance, on the question of whether the ostensibly non-political Second Circuit JNC is now proceeding with extraordinary haste to select recommendations to replace Judge Harley, giving only 12 days for applications to be filed. Why would this be so? The advisory opinion process does not enable us to discover the answer.

Likewise, the Governor’s request for an advisory opinion does not allow for the development of the factual bona fides of the Governor’s concern about “surprise, last-minute contests that would be skewed in favor of a small pool of members of the Bar possessing inside information and those with the wherewithal to mobilize for a campaign very, very quickly.” Governor’s Request at 4. The record conclusively shows that there are no such surprise judicial vacancies or

surprise candidacies in this electoral contest. App.-5. Moreover, the JNC's activities raise a much more serious question as to whether the surprise, last-minute application process — expedited by a decision made in secret by unknown persons — would be skewed in favor of a small pool of members of the Bar possessing different “inside information” and with the wherewithal to produce a long, detailed application “very, very quickly.” This case makes clear that discovery and a factual record are important to the process.

Therefore, the Justices should decline to issue an advisory opinion in response to the Governor’s request under the circumstances.

**II. IF THE JUSTICES RENDER AN ADVISORY  
OPINION, IT SHOULD RECOMMEND THAT  
JUDGE HARLEY’S REPLACEMENT BE  
ELECTED.**

Three candidates have made substantial investments of time and treasure to qualify to present their candidacies to the voters for election to Seat 5. The voters of Leon County have a right to choose among them. The Supervisor entered this controversy to vindicate the important rights of these candidates and the voters.

The Constitution grants the Governor a limited prerogative to appoint replacements to “vacant” judicial seats, *see* Art. V, § 11(b), Fla. Const., but the rights inhering in the people trump the prerogatives accorded to the executive. *See* Art. I, § 1, Fla. Const. In this case, the Governor wishes to trump the right of the

people based on a constitutional provision that gives him that power only if it is interpreted aggressively in favor of his powers. This Court's holdings require the opposite approach to constitutional interpretation:

We have historically since the earliest days of our statehood resolved as the public policy of this State that interpretations of the constitution, absent clear provision otherwise, should always be resolved in favor of retention in the people of the power and opportunity to select officials of the people's choice, and that vacancies in elective offices should be filled by the people at the earliest practical date.

*Spector v. Glisson*, 305 So. 2d 777, 781 (Fla. 1974). Therefore, the Governor's interpretation of the law should be rejected.

The Governor's concern about a lengthy judicial vacancy is based on dubious premises. Regardless of how the Justices of this Court opine, Leon County will be without a replacement for Judge Harley for some period of time. If the Governor appoints a judge, the vacancy may only exist for 30 to 90 days. If the election is held, the vacancy will exist for 250 days.

It takes a substantial amount of time to train new county judges. If the Governor appoints, the appointed judge will serve a limited term and face a nearly immediate need to begin to campaign to retain the seat after the foreshortened term of appointment. If the election proceeds, the voters of Leon County will elect a judge from among the three qualified candidates who will serve a full six-year



term.

If the Governor appoints a judge, the people of Leon County will have a judge not of their choosing for a period of 30 to 33 months. Conversely, if the election proceeds, there will be no period of time in which an unelected judge serves the people of Leon County.

All in all, the Governor's concerns do not form a satisfactory basis for the Justices of this Court to deviate from the clear holding of *Spector* (which is, in fact, a binding precedent and not an advisory opinion):

. . . We feel that . . . if the elective process is available, and if it is not expressly precluded by the applicable language, it should be utilized to fill any available office by vote of the people at the earliest possible date. Thus the elective process retains that primacy which has historically been accorded to it consistent with the retention of all powers in the people, either directly or through their elected representatives in their Legislature, which are not delegated, and also consistent with the priority of the elective process over appointive powers except where explicitly otherwise provided. We thereby continue the basic premise of our democratic form of government, that it is a 'government of the people, by the people and for the people.'

*Spector*, 305 So. 2d at 782.

Beyond making the foregoing points, Sancho defers to, adopts and endorses the legal analysis set forth in the brief of the interested parties Richardson and Desmond. They have satisfactorily provided a legal analysis showing that this Court's precedents do not support the Governor's view that he is empowered to

make an appointment for the replacement of Judge Harley.

Therefore, should the Justices provide an advisory opinion, they should opine that the Constitution and statutes of Florida require Judge Harley's replacement to be chosen by election, not appointment.

### **CONCLUSION**

The Justices should decline to issue an advisory opinion. If the Justices issue an advisory opinion, they should opine that the voters have a right to select the judge for Seat 5 under the circumstances of this case.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on May 12, 2008, I served a copy of this brief and its Appendix by U.S. Mail on counsel on the attached Service List.

### **CERTIFICATE OF FONT COMPLIANCE**

I hereby certify that this brief is printed in 14-point Times New Roman type.

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