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SUPREME COURT OF FLORIDA

Case No.: SC14-1941
Lower Tribunal Case Nos.: 1D14-3667; 2014 CA 1435

David P. TROTTI,
Petitioner,

v.

Ken DETZNER, Secretary of State, State of Florida,
Respondent.

JURISDICTIONAL BRIEF OF RESPONDENT FLORIDA SECRETARY OF STATE

On review from the First District Court of Appeal

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STATEMENT OF THE CASE AND FACTS[1]

The majority opinion of the District Court's decision contains a full and accurate statement of the case and facts relevant to the determination of this Court's jurisdiction. *Reaves v. State*, 485 So. 2d 829, 830 & n.3 (Fla. 1986) ("The only facts relevant to [the] decision to accept or reject … petitions [to invoke this Court's conflict jurisdiction] are those facts contained within the four corners of the decisions allegedly in conflict," and the Court will not base jurisdiction on "the record" or "dissenting opinions."). It is restated, largely verbatim, as follows:

On March 26, 2014, Circuit Judge Donald R. Moran, Jr. tendered to the Governor a letter of resignation from his seat on the Fourth Judicial Circuit, Group 12. His resignation was to be "effective the last day of my term in January 2015." On March 31, 2014, Judge Moran sent a second letter, clarifying that his specific date of resignation was to be Friday, January 2, 2015, three days before his term was due to expire. *See* Art. V, § 10(b)(3)b., Fla. Const.; § 100.041(4), Fla. Stat.

On April 2, 2014, Petitioner filed a Form DS-DE 9 with the Division of Elections (the Division) indicating his intention to run for election for the seat at issue.[2] On April 3, 2014, the Division acknowledged receipt of Petitioner's

[1] Citations to the Appendix are to Petitioner's Appendix "Appx. * at **" where * is the Appendix item and ** is the page number of that Appendix item.

[2] Form DS-DE 9 must be filed before a candidate may raise or spend campaign funds, which can occur up to almost two (2) years prior to the qualifying period for the office sought. § 106.021(1)(a), Fla. Stat.

preliminary paperwork and placed him on the Division's list of active candidates on the Secretary's website. The qualifying period was set to begin on April 28, 2014, and end on May 2, 2014. *See* §§ 105.031(1), 100.061, & 100.032, Fla. Stat.

On April 10, 2014, the Governor sent Judge Moran a letter accepting his resignation. On April 25, 2014, Petitioner received an email from the Division informing him that Judge Moran had submitted his resignation and Group 12 would be filled by gubernatorial appointment rather than election. The Division advised Petitioner to withdraw his candidacy or apply for candidacy in a different group.

Petitioner filed this action seeking a writ of mandamus compelling the Secretary to accept his qualifying items for Judge Moran's seat. On September 17, 2014, the First District affirmed the circuit court's decision that the vacancy should be filled by gubernatorial appointment rather than by election.[3] Petitioner's motion for rehearing and certification was denied on September 29, 2014.

SUMMARY OF THE ARGUMENT

There is no conflict jurisdiction to review the decision of the District Court, because it is consistent with all applicable decisions of this Court, which provide that when a judicial vacancy occurs before the start of qualifying, it should be filled by appointment. Appellant compares the decision to *Spector v. Glisson*, 305 So. 2d

[3] Petitioner's petition for writ of mandamus was originally filed with this Court. On June 2, 2014, this Court transferred the petition to the Second Judicial Circuit, in and for Leon County.

777 (Fla. 1974), an opinion decided on distinguishable facts prior to the enactment of a 1996 constitutional amendment providing for the delay of scheduled elections in the event a vacancy arises under circumstances such as these.

In this case a resignation was tendered before the start of qualifying, creating an actual vacancy in the current term of office that must be filled by appointment under controlling case law of this Court. By contrast, the *Spector* case involved a resignation that would not be effective until the beginning of the *subsequent* term and would be filled by the intervening election. As such, the District Court did not reach an "opposite" conclusion with a decision on substantially, "if not identical," "controlling facts." *Crossley v. State*, 596 So. 2d 447, 449 (Fla. 1992).

There is no jurisdiction on the basis that the District Court decision construed a provision of the Florida Constitution. To be subject to review, a decision must explain, define, or overtly state a view which eliminates some existing doubt as to a constitutional provision. The District Court rejected the application of the *Spector* decision, but did not "explain or define any constitutional terms or language." *Ogle v. Pepin*, 273 So. 2d 391, 393 (Fla. 1973).

Neither does the decision expressly affect a class of officers. Appellant's action was brought to determine the authority of the Secretary of State, not of judges. Neither the Secretary—nor the Governor, whose appointment authority is at issue—are members of a "class," which is defined as "two or more constitutional or state

officers who separately and independently exercise identical powers of government." *Florida State Bd. of Health v. Lewis*, 149 So. 2d 41, 43 (Fla. 1963).

ARGUMENT

I. THE DECISION OF THE DISTRICT COURT IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

Conflict jurisdiction requires that a district court's "decision" "expressly and directly conflict[]" with a decision of another district court or "the supreme court on the same question of law." Art. V, § 3(b)(3). The conflict "must appear within the four corners of the majority decision" and "[n]either a dissenting opinion nor the record itself can be used." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). Conflicting decisions "on the same question of law" are those that reach "opposite" holdings on substantially, "if not identical," "controlling facts." *Crossley v. State*, 596 So. 2d 447, 449 (Fla. 1992). The holdings must be "irreconcilable." *Aravena v. Miami-Dade County*, 928 So. 2d 1163, 1166 (Fla. 2006).

There is no conflict jurisdiction to review the decision of the District Court, because it is consistent with all applicable decisions of this Court, which has consistently held that "when a vacancy occurs in the county or circuit courts before the qualifying period of the seat commences, the vacancy should be filled by appointment." *Advisory Op. to Gov. re Judicial Vacancy Due to Resignation*, 42 So. 3d 795, 797 (Fla. 2010); *see also, e.g., Advisory Op. to Gov. re Appointment or Election of Judges*, 983 So. 2d 526, 530 (Fla. 2008); *Advisory Op. to Gov. re Sheriff*

& Judicial Vacancies Due to Resignations, 928 So. 2d 1218, 1220–21 (Fla. 2006). Instead of comparing the District Court's decision to applicable precedent, Appellant compares the decision to *Spector v. Glisson*, 305 So. 2d 777 (Fla. 1974), an inapposite opinion based on materially different facts.

In *Spector*, the incumbent justice resigned effective at the *end* of his term—"midnight" on the last day, "the time immediately before a successor normally assumes office . . . pursuant to election." *Spector*, 305 So. 2d at 780. Here, the resignation and its future effective date occur *before* the end of the current term, creating an interim vacancy. This factual distinction was acknowledged in a prior opinion of the First District, which recognized that this Court has "effectively limited the application of *Spector* to situations in which a judge resigns effective at a future date and *no interim vacancy will exist*." *See Pincket v. Harris*, 765 So. 2d 284, 287 (Fla. 1st DCA 2000) (emphasis added) (citing *In re Advisory Op. to Gov. (Judicial Vacancies)*, 600 So. 2d at 462).

The District Court followed this Court's precedent and concluded that because the "vacancy occurred before the qualifying period commenced, the Secretary could not conduct a qualifying period because the vacancy had to be filled by appointment." Op. at 5–6 (citing *Advisory Op. to Gov. re Sheriff & Judicial Vacancies Due to resignations*, 928 So. 2d at 1220–21; *Advisor Op. to Gov. re Judicial Vacancy Due to Resignations*, 42 So. 3d 795, 797 (Fla. 2010)). Yet,

Appellant argues that when a resignation has a future effective date and an intervening election is scheduled, it *must* be filled by election unless there is "an emergency or public business" requiring an appointment. JB at 6 (citing *Spector*, 305 So. 2d at 784).

Appellant's assertion is belied by this Court's subsequent cases, none of which were decided on the rationale that Appellant extracts from the *Spector* decision. In several cases this Court has found that a vacancy that arose before the qualifying period should be filled by appointment—even under circumstances where an intervening election was available. *Advisory Op. to Gov. re Sheriff & Judicial Vacancies Due to Resignations*, 928 So. 2d 1218, 1220–21 (Fla. 2006); *Advisory Op. to Gov. (Judicial Vacancies)*, 600 So. 2d 460 (Fla. 1992). This Court decided in other cases that a vacancy that arose *after* the start of qualifying should be filled by election, even though the appointment process could have filled the vacancy much sooner. *Advisory Op. to Gov. re Appointment or Election of Judges*, 824 So. 2d 132 (2002) (deciding vacancy should be filled by election, despite leaving a seven-month vacancy); *Advisory Op. to Gov. re Appointment or Election of Judges*, 983 So. 2d 526 (Fla. 2008) (deciding upon election, despite eight-month vacancy).

Additionally, the *Spector* decision predated a 1996 amendment to article V, which extended the length of gubernatorial appointments from the end of the term of a vacating officer to a term ending in "the year following the next primary and

general election *occurring at least one year after the date of appointment*." Art. V, § 11(b), Fla. Const. (emphasis added). The amendment, enacted to address the "difficulties with appointing qualified individuals to serve relatively briefly on the circuit bench," was "intended to provide the governor with the authority to appoint" even "when an election is scheduled within the foreseeable future." *Pinckett*, 765 So. 2d at 288. Thus, the fact that an appointment might delay an intervening election is taken for granted as a consequence of the constitutional requirement that the Governor fill vacancies by appointment for a term of at least one year.

The District Court's decision is not in conflict with the *Spector* decision, the holding of which is justified by its materially different facts. It is, however, consistent with all applicable post-*Spector* cases. There is no conflict between this case and any decision of this Court "on the same question of law" based on "controlling facts." *Crossley*, 596 So. 2d at 449; Art. V, § 3(b)(3), Fla. Const.[4]

II. THE DECISION OF THE DISTRICT COURT DOES NOT CONSTRUE A PROVISION OF THE STATE CONSTITUTION.

The Florida Constitution provides that this Court may review a decision of a district court that "expressly construes a provision" of the Florida Constitution. Art.

[4] Appellant also accuses Judge Moran of not resigning "in all good faith." JB at 6. Judges are no different than other elected officials subject to the gubernatorial appointment authority: the timing of their resignations can sometimes influence the manner in which their successors are selected. Sometimes this results in an appointment; other times it results in an election. Appellant's aspersions on Judge Moran's motives lend no support to the argument that conflict jurisdiction exists.

V, § 3, Fla. Const. In another effort to shoehorn the District Court decision into this Court's jurisdiction, Appellant argues that "the case at hand *requires an interpretation* of the Florida Constitution." JB at 7 (emphasis added). However, jurisdiction "is not properly invoked" merely because the lower court "[a]ppl[ied] a constitutional provision to the facts before it." *Dykman v. State*, 294 So. 2d 633, 634–35 (Fla. 1973). Jurisdiction based on a lower court's "construction of a Constitutional provision" must arise from an express ruling that "explains, defines, or overtly states a view which eliminates some existing doubt as to a constitutional provision." *Dykman v. State*, 294 So. 2d 633, 634–35 (Fla. 1973); *Ogle v. Pepin*, 273 So. 2d 391, 393 (Fla. 1973) (declining jurisdiction where lower court "failed to explain or define any constitutional terms or language").

The District Court did not construe a constitutional provision. It rejected Appellant's argument that the rationale *of a court opinion* applied to the facts. Op. at 6–7 (rejecting Appellant's application of the *Spector* decision). The District Court instead applied the principles set forth in more recent opinions this Court. The decision was not one involving constitutional construction, as it did not "explain or define any constitutional terms or language," *Ogle*, 273 So. 2d at 393, or eliminate any "existing doubt as to a constitutional provision," *Dykman*, 294 So. 2d at 635; *cf. State v. Lyons*, 293 So. 2d 391, 393 (Fla. 1974) (finding "[m]isapplication of settled constitutional doctrine" does not "amount[] to a construction of the constitution").

III. THE DISTRICT COURT DECISION DOES NOT EXPRESSLY AFFECT A CLASS OF CONSTITUTIONAL OR STATE OFFICERS.

Appellant characterizes his cause of action as one expressly affecting judges—a class of constitutional officers. However, this action was brought to determine the powers and duties of the Secretary of State, not judges. *See Spradley v. State*, 293 So. 2d 697, 701–702 (Fla. 1974) (A decision must "[d]irectly and . . . [e]xclusively affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers.").

Appellant sought a petition for writ of mandamus to compel the Secretary of State to accept his qualifying papers. Op. at 3. The term "class" means "two or more constitutional or state officers who separately and independently exercise identical powers of government." *Florida State Bd. of Health v. Lewis*, 149 So. 2d 41, 43 (Fla.1963). The Secretary is not a member of a "class" of officers. Similarly, even the District Court decision's effect on the duty of the Governor to fill vacancies by appointment does not give rise to jurisdiction, because the Governor is not a member of a class. *Id.* (noting that "an individual member of the State Cabinet, in the exercise of the functions of his particular office, does not constitute a 'class'").

IV. ACCEPTING JURISDICTION WOULD DEFY THIS COURT'S SUBSTANTIVE JURISPRUDENCE AND PRUDENTIAL GUIDANCE ON THE ELECTION-VERSUS-APPOINTMENT QUESTION.

It was for the purpose of promoting "consistency in the process of filling judicial vacancies" that this Court "identified the beginning of the statutory

qualifying period as a fixed point to mark the commencement of the election process." *In re Advisory Op. to Gov. re Judicial Vacancy Due to Resignation*, 42 So. 3d at 797 (citing *In re Advisory Op. to Gov. re Appointment or Election of Judges*, 983 So. 2d at 529) (providing a "definitive time period and a practical answer to the election-versus-appointment" question). Without such a "set date," courts "would routinely be called upon" to revisit the same question based on the "variable factors" that arise during "every election year." *Id.*

Yet, in defiance of this Court's controlling pronouncements, both substantive and prudential, Appellant seeks review based on an obsolete case decided on distinguishable facts prior to a pertinent constitutional amendment. The District Court correctly found that the Secretary of State was bound to follow clearly established law requiring the vacancy created by Judge Moran's resignation to be filled by appointment. Review of that decision does not fall within the jurisdiction set forth in Article V of the Florida Constitution.

CONCLUSION

Respondent Secretary of State respectfully urges this Court to decline review of the District Court's decision, which does not fall within the jurisdiction granted by the Florida Constitution.

Respectfully submitted,

/s/ J. Andrew Atkinson

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was sent by email this 4th day of November, 2014 to:

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(2).

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