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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC16-768

STEVE PINCKET

Petitioner,
v.

SECRETARY OF STATE
KEN DETZNER,

Respondent.
_____/

FLORIDA SECRETARY OF STATE'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

The Florida Secretary of State responds to the Petition for Writ of Mandamus and respectfully asks that the Court dismiss or deny it without hearing because, as Petitioner concedes, Florida law requires that the vacancy at issue be filled by appointment. Accordingly, Petitioner has no legal right to qualify for an election that cannot be held as a matter of law. Despite this, Petitioner improperly invokes mandamus to create new law and to then have the Court hold the Secretary accountable to this yet-to-be announced standard. At bottom, Petitioner takes issue with the motive for and manner in which a few circuit judges resigned; however, the writ sought is not the appropriate vehicle to air such concerns. The Court should decline Petitioner's invitation to create a new legal right, and to compel the Secretary's performance of a legal duty, that does not exist to date.

INTRODUCTION

Petitioner, by his own admission, seeks to avoid or undo a directly on-point decision of the First District Court of Appeal, *Trotti v. Detzner*, 147 So. 3d 641 (Fla. 1st DCA 2014), that was decided less than two years ago. This Court refused discretionary review twice in that case: First, it transferred the mandamus petition originally filed with the Court to the circuit court; and second, after the First District affirmed the denial of mandamus, this Court declined review of that decision. *Trotti*, Petitioner concedes, is dispositive of this matter; yet Petitioner now invokes the Court's original jurisdiction to avoid its effect. Petitioner cannot wield mandamus to collaterally attack *Trotti*. A writ for mandamus cannot lie here because Petitioner has no legal right to qualify—and the Secretary has no duty to qualify Petitioner—for an election that cannot be held as a matter of law.

Petitioner here challenges the conduct of the Secretary (and implicitly that of the Governor) with respect to the vacancy created by the resignation of Judge Shinholser from the Tenth Judicial Circuit. Judge Shinholser resigned on April 1, 2016 [Pet.Appx. A], and the Governor accepted the resignation on April 13, 2016 [Pet.Appx. B]—prior to the commencement of the qualifying period of May 2, 2016. The Secretary subsequently removed the Group 6 seat from the election. [Pet.Appx. D] Petitioner claims entitlement to qualify for an election to fill the vacant seat.

The Florida Constitution establishes that a vacancy occurs upon a resignation by the incumbent, and it directs the Governor to fill judicial vacancies by appointment and use of a judicial nominating commission, regardless of the length of that vacancy. The Secretary can only qualify circuit judge candidates for seats that actually are up for election. Because the Governor's convening of the judicial nominating commission and his anticipated appointment to fill the vacancy obviates an election for the seat, the Secretary cannot qualify candidates as a matter of law. Accordingly, Petitioner has no legal right to qualify for the seat. Thus, the Secretary acted squarely within his legal authority. In fact, the Secretary had no discretion to act in any way other than how he did. There is no basis for the writ, and the Petition must be denied.

ARGUMENT

I. PETITIONER CONTORTS THE PURPOSE OF MANDAMUS TO IMPERMISSIBLY EFFECT A CHANGE IN LAW.

"Mandamus may not be used to establish the existence of a right, but only to enforce a right already clearly and certainly established in the law." *Fla. League of Cities v. Smith*, 607 So. 2d 397, 400 (Fla. 1992). Mandamus will not lie absent the breach of an indisputable ministerial legal duty. *Pincket v. Harris*, 765 So. 2d 284, 288 (Fla. 1st DCA 2000). Petitioner asks the Court to abandon the true purpose of this extraordinary writ and use it as a vehicle to make new law.

Petitioner concedes that the Governor is authorized to fill the judicial vacancy by appointment. *See* Pet. at 9 ("It is true that a resignation before the qualifying period would ordinarily require an appointment."). That concession makes sense because a resignation by an incumbent effective prior to the expiration of the end of his term creates a vacancy. *See* Art. X, § 3, Fla. Const.;[1] Art. V, §11(b), Fla. Const. (requiring Governor to fill vacancy by appointment). Because the Governor acted within his constitutional authority to begin the appointment process, the Secretary cannot, as a matter of law, qualify candidates for the seat at issue. More importantly, Petitioner has no legal right to qualify and run in an election that is not authorized by law.

Petitioner's true purpose is to have this Court *create* law in three respects: (i) by creating a new legal right to qualify and run for an office that the law requires be filled by appointment; (ii) by writing in a new exception to the

[1] *Cf.* Op. Att'y Gen. Fla. 2010-51 at 4 (Dec. 28, 2010) (noting that Article X, section 10, of the Florida Constitution sets out the exhaustive list of circumstances under which "vacancy" occurs in office, and that expiration of a term of office is not one of those specified circumstances); *State ex rel. Hardee v. Allen*, 172 So. 222, 224 (Fla. 1937) ("A 'term of office' has reference to that fixed by law" and concept of "vacancy" confined to within that current term of office); *State ex rel. Landis v. Baxter*, 165 So. 271, 271 (Fla. 1936) ("It is settled law that an office is not vacant as long as it has an incumbent who has lawful right under constitutional or statutory authority to continue therein, either for a fixed term or until the happening of a future event."); *State ex rel. Landis v. Bird*, 163 So. 248 (Fla. 1935) (discussing vacancies in office and expiration of terms of office).

Governor's constitutional appointment power;[2] and (iii) by drafting and implementing a new rule of judicial conduct. "If the Court were so inclined," Petitioner urges, "it could prohibit judges from resigning more than 120 days in the future." Pet. at 20. Petitioner continues, asking this Court to engage in line-drawing (read: policymaking):

> The petitioner *does not suggest that this is the only potential remedy* or even that it is the best one. This Court *may have other ideas and solutions*. The point Petitioner makes here is simply that the Court should not back away from a serious problem like this *merely because it is difficult to draw a line*.

Pet. at 19 (emphasis supplied). Petitioner urges the Court to adopt new policy to govern judicial vacancies by regulating judicial conduct. *See* Pet. at 4 (framing issue presented as one of judicial administration rather than the lawful exercise of executive authority). This Court undoubtedly has exclusive jurisdiction to regulate judicial conduct under Article V, section 12; however, that is not at issue here. More to the point, mandamus cannot be used to create a new legal right or effect policy, and the Petition should be denied.

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[2] Effecting that type of change could only be achieved by amendment to the Florida Constitution, not an extraordinary writ. *See Spector v. Glisson*, 305 So. 2d 777, 784-85 (Fla. 1974) (Boyd, J., dissenting) ("If the people should find Section 11 of Article V mentioned above unacceptable, the Constitution should be changed by the people and not by this Court.").

II. THE FLORIDA CONSTITUTION AND PRECEDENT UNAMBIGUOUSLY REQUIRE FILLING THE VACANCY BY APPOINTMENT, PETITIONER HAS NO LEGAL RIGHT TO QUALIFY FOR THE SEAT AT ISSUE, AND THE SECRETARY HAS NO LEGAL DUTY TO QUALIFY A CANDIDATE FOR AN OFFICE NOT UP FOR ELECTION.

Leaving aside Petitioner's misuse of mandamus, it is clear that the Petition must fail because the Florida Constitution and this Court's precedent require that the vacancy be filled by appointment, and not by election. As a result, Petitioner has no legal right to qualify (and the Secretary has no duty to qualify him) for the seat because no election can be had as a matter of law. The Florida Constitution unambiguously requires that:

> The governor *shall fill each vacancy* on a circuit court ... *by appointing* for a term ending on the first Tuesday after the first Monday in January of the year following the next primary and general election *occurring at least one year after the date of appointment*…. An election shall be held to fill that judicial office for the term of the office beginning at the end of the appointed term.

Art. V, § 11(b), Fla. Const. (emphasis supplied). The Governor's appointment power under Article V, section 11(b) yields to only one exception—when the election process has commenced prior to the vacancy occurring. *See, e.g.*, *Judicial Vacancy Due to Resignation,* 42 So. 3d 795, 797 (Fla. 2010); *Appointment or Election of Judges (2008)*, 983 So. 2d 526, 528-30 (Fla. 2008); *Sheriff & Judicial Vacancies*, 928 So. 2d 1218, 1220-21 (Fla. 2006); *Appointment or Election of*

Judges (2002), 824 So. 2d 132, 135 (Fla. 2002).[3] Because Judge Shinholser's resignation and acceptance occurred prior to commencement of the election process, that narrow exception does not apply here and, as a matter of law, the Secretary cannot qualify candidates for an office that will not be up for election.

The Secretary acted exactly as the Florida Constitution, this Court's precedent, and Florida statutory law require. *See* Art. V, § 11(b)-(d), Fla. Const. (directing Governor to fill judicial vacancies by first convening judicial nominating commission); Art. VI, § 5(a), Fla. Const. (limiting general elections (1) "to choose a successor to each elective state and county officer whose term will expire before the next general election"; and (2) "except as provided [in the Florida Constitution], to fill each vacancy in elective office for the unexpired portion of the term"); Art. X, § 3, Fla. Const. (defining "vacancy" as occurring upon "resignation of the incumbent"); § 105.031, Fla. Stat. (designating the Florida Division of Elections as the qualifying office for candidates for office of circuit judge; requiring candidates to qualify by group number; and requiring candidate for

[3] A vacancy occurs when the resignation letter is received and accepted by the Governor, which starts the process for filling the vacancy. *Judicial Vacancies,* 600 So. 2d 460, 462 (Fla. 1992); *see also Sheriff & Judicial Vacancies*, 928 So. 2d at 1220 (citing same). The election process begins when a candidate has qualified for the circuit judgeship. *Appointment or Election of Judges (2002)*, 824 So. 2d at 135; *see also Appointment or Election of Judges (2008)*, 983 So. 2d at 528-30 (recognizing limitation of *Appointment or Election of Judges (2002)* to circumstance where a candidate had qualified during the statutory qualifying period); *Sheriff & Judicial Vacancies*, 928 So. 2d at 1220 (same).

circuit judge to submit to the Division a candidate's oath that includes specification of group to which candidate will be seeking election); *Trotti*, 147 So. 3d at 645 (affirming denial of mandamus and holding that vacancy created by resignation accepted prior to qualifying "*must* be filled by gubernatorial appointment," regardless of how long physical vacancy will be during remainder of term) (emphasis supplied).

Petitioner also concedes that under precedent from the First District Court of Appeal, issued on facts nearly identical to those present here, a judicial vacancy "of *any* duration," even one-day long, is sufficient to trigger the Governor's power to fill the office by appointment. Pet. at 13 (emphasis in original); *see Trotti*, 147 So. 3d at 645 (affirming denial of mandamus and holding that vacancy created by resignation submitted and accepted prior to qualifying "*must* be filled by gubernatorial appointment," regardless of how long physical vacancy will be during remainder of term) (emphasis supplied).

Because a gubernatorial appointment is required to fill the vacancy at issue "for a term ending on the first Tuesday after the first Monday in January of 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., there is no general election for which the Secretary could qualify candidates, *see* Art. VI, § 5(a), Fla. Const. (calling for general election "to choose a successor to each elective state

and county officer whose term will expire before the next general election"). As a result: Petitioner has no legal right to qualify for the seat, the Secretary does not have a legal duty to qualify her for election to that seat, and the Petition should be denied.

But Petitioner is not really asking the Court to enforce a legal right by compelling performance of an indisputable ministerial duty. Rather, Petitioner asks this Court to overturn *Trotti*, a decision of the First District Court of Appeal, not even two years old, that happens to be one in which Petitioner's counsel dissented, *see Trotti*, 147 So. 3d at 645-48 (Padavano, J., dissenting). It is a decision that this Court twice refused to exercise jurisdiction to review. *See Trotti v. Detzner*, Case No. SC14-852, Transfer Order (May 29, 2014) (transferring to the circuit court pursuant to *Harvard v. Singletary*, 733 So. 2d 1020 (Fla. 1999)); *Trotti v. Detzner*, Case No. SC14-1941, 157 So. 3d 1051 (Nov. 10, 2014) (review panel unanimously declining to accept jurisdiction). In place of the First District's *Trotti* precedent, Petitioner urges the creation of a new rule of law, and asks the Court to determine that the Secretary has acted outside his authority in failing to follow that yet-to-be announced rule.

In *Trotti* the judicial vacancy occurred prior to commencement of the election process and existed for one day. The district court applied the standard

established by this Court[4] and rejected an approach based upon the perceived reasonableness of the vacancy's constitutional duration. *See Trotti*, 147 So. 2d at 645. The court recognized that analyzing "the reasonableness of the vacancy ... *would be arbitrary*...." *Id*. (emphasis supplied). "Deciding the election versus appointment question on the duration of the vacancy created, rather than on the interplay between the vacancy and the commencement of the election process, would *result in inconsistent and confusing precedent*." *Id.* (emphasis supplied). The First District, then, declined to engage in the subjective exercise of determining what does or does not constitute an unreasonable vacancy. In doing so, the appellate court recognized that requiring an election when the election process had not begun would nullify the Governor's appointment power under Article V, section 11(b). *See id*. at 644-45 (discussing cases and noting that "we would be allowing the limited exception created by *Spector* to swallow Article V, section 11(b), of the Constitution.").

Petitioner sidesteps *Trotti* (and this Court's precedent underlying that decision) and instead relies primarily upon *Spector v. Glisson*, 305 So. 2d 777 (Fla. 1974), to argue (implicitly, if not explicitly) that *Trotti* runs counter to this Court's holding in *Spector*. *See* Pet. at 13 (noting that *Trotti* "was not a logical step"

[4] *See Judicial Vacancy Due to Resignation,* 42 So. 3d 795, 797 (Fla. 2010); *Appointment or Election of Judges (2008)*, 983 So. 2d 526, 528-30 (Fla. 2008); *Sheriff & Judicial Vacancies*, 928 So. 2d 1218, 1220-21 (Fla. 2006); *Appointment or Election of Judges (2002)*, 824 So. 2d 132, 135 (Fla. 2002).

following *Spector*); *id*. at 13-18 (criticizing *Trotti* as erroneous and advocating for application of a new rule and different result); *see also id.* at 18-19 (discussing how rule announced in *Trotti* circumvents "principle stated in *Spector*"). But, if such a conflict actually existed (and it does not), this Court recently exercised its discretion and declined jurisdiction to consider that putative conflict. *Cf.* Art. V, § 3(b)(3), Fla. Const. (granting discretionary jurisdiction to review a district court of appeal decision that "directly conflicts with a decision . . . of the supreme court on the same question of law"); *see Trotti*, Case No. SC14-1941, 157 So. 3d 1051 (Nov. 10, 2014) ("This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for review is denied.").

Petitioner's reliance upon *Spector* is misplaced. In the four decades since that decision, this Court has established a bright-line rule that controls the result here: Article V, section 11(b) requires that the Governor fill the vacancy by appointment. The decision in *Trotti* is firmly rooted in the Florida Constitution and this Court's post-*Spector* jurisprudence.[5] Petitioner concedes that, but for his

[5] See cases at note 4, above. Although Petitioner cites *Pleus v. Crist*, 14 So. 3d 941 (Fla. 2009), as "reaffirming" *Spector*, it has no application here. The issue in *Pleus* involved the Governor's duty under Article V, section 11(c) relating to

filing in this Court, *Trotti* would control the outcome: "If this Court were to transfer the case to the circuit court, the result would be a *foregone conclusion*. The circuit court has *no authority to depart from the holding by the First District Court of Appeal in Trotti*...." Pet. at 5 (emphasis supplied). The statement of law in *Trotti* controls regardless of whether the Petition is filed here or in a lower court, and Petitioner cannot sweep it away by improperly resorting to the extraordinary writ process.[6]

The fact that *Trotti* is both consistent with this Court's prior decisions and controlling here ends the matter. The vacancy here is required to be filled by gubernatorial appointment, and Petitioner has no clear legal right to qualify (and the Secretary has no duty to qualify him) for an election that cannot be held as a matter of law.

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selecting nominees from the list provided by the Judicial Nominating Committee. *Id*., at 945-46. That case presented a much different issue from the instant matter, which is on point with *Trotti* and this Court's longstanding jurisprudence under section 11(b).

[6] Petitioner is not making proper use of the extraordinary writ procedures of this Court. The Petition is nothing more than an improper attack on *Trotti* and a misplaced effort to seek judicial review by this Court outside the constitutional framework established for that review. *Cf. Mathews v. Crews*, 132 So. 3d 776, 778 (Fla. 2014) ("It is well-settled that mandamus is [not] the appropriate vehicle to seek review of an allegedly erroneous decision by another court...."); *id.* at 779-80 ("We take this opportunity to caution all litigants that the writ of mandamus cannot be used to review an allegedly erroneous judicial decision. Moreover, mandamus and other writs cannot be used to circumvent the constitutional restrictions on this Court's jurisdiction to review certain types of district court of appeal decisions by extraordinary writ.").

III. PETITIONER'S CONCERNS ABOUT REGULATING JUDICIAL CONDUCT CANNOT BE ADDRESSED BY EXTRAORDINARY WRIT HERE.

Before concluding, it is worth noting what Petitioner admits is his real focus: the motivation of a judge when submitting his or her letter of resignation. Petitioner urges this Court to adopt a new rule based upon the duration of the vacancy to prevent judges from "manipulating" the process. *See* Pet. at 3 ("The *ultimate question* presented in this case is whether a circuit judge whose term is expiring *can effectively decide* that his or her successor will be chosen by appointment rather than an election....") (emphasis supplied); *id.* at 9 ("the petitioner respectfully submits that the process of selecting judges cannot be manipulated [by resigning judges] in this way...."); *id.* at 14 ("The effect of the decision in *Trotti*, though obviously well intended, was *to empower judges to decide* how their successors are chosen.") (emphasis supplied).

These concerns have nothing to do with the instant Petition. To the contrary, the "ultimate question" here—and the only one properly under mandamus—is whether Petitioner has a clear legal right to qualify for election to the seat at issue. And the answer is simple: No, because Article V, section 11(b) requires filling the vacancy by appointment, obviating an election for which the Secretary could qualify candidates. The motivation of a judge in submitting his or her resignation is beside the point.

Put another way, mandamus here is the wrong vehicle by which to question the motivation of a judge for resigning at a particular time. While Petitioner may take issue with the timing, motive, and manner of Judge Shinholser's resignation, the place for airing that concern is not here, and the means for doing so is not through the instant Petition. Petitioner seems to acknowledge as much, but curiously, he nonetheless persists as follows:

> Whether a judge can properly submit a resignation in such a way as to avoid an election is not only a question of constitutional law but also *a question of judicial administration*. This Court has exclusive jurisdiction under Article V, section 12 of the Florida Constitution to regulate the conduct of judges. Consequently, this Court might be the only Florida court that could fashion an appropriate remedy.

Pet. at 4 (emphasis supplied).

Petitioner advocates for this Court—within the context of mandamus and outside its rulemaking and judicial discipline procedures—to create a new rule regulating the conduct of judges: "If the Court were so inclined, it could prohibit judges from resigning more than 120 days in the future." Pet. at 18. Without commenting on the merits of this extraordinary proposal, suffice it to state here that a writ of mandamus against the Secretary is not the appropriate forum in which to consider or adopt such judicial policy changes. Whatever Petitioner's concerns are regarding judicial policy or a judge's motivation for resigning, *see id*.

at 19 (inviting the Court to use mandamus to fashion a remedy by line-drawing), mandamus has not been and cannot be used this way.

CONCLUSION

There is no legal basis for granting the Petition. The Florida Constitution, this Court's precedent, and *Trotti* unambiguously require that the vacancy at issue be filled by gubernatorial appointment. Accordingly, Petitioner has no clear legal right to qualify—and the Secretary has no legal duty to qualify Petitioner—for an office that cannot be filled by election as a matter of law.

The Petition for Writ of Mandamus should be dismissed or denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above document was filed via the Florida Courts E-Filing Portal on this 23rd day of May, 2016, which will serve the following counsel of record:

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I HEREBY CERTIFY that the above response complies with Rule 9.100(*l*), Florida Rules of Appellate Procedure.

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