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IN THE SUPREME COURT OF FLORIDA

STEVE PINCKET

Petitioner,

v. Case No. SC16-768

KEN DETZNER, as
Secretary of State of the State of Florida,

Respondent.
_____/

REPLY

The Petitioner, Steve Pincket, respectfully submits this reply to the response submitted by the Respondent, Secretary of State Ken Detzner.

I. Introduction

The response submitted by the Secretary does not address or even mention the constitutional provision that is the basis for the petitioner's argument. Article V, section 10(b)(1) of the Florida Constitution provides in material part that "[t]he election of circuit judges "shall be preserved" and it commands that "[t]he election of circuit judges shall be by a vote of the majority of the electors within the territorial jurisdiction of the court." By this provision, the people of Florida expressed their will to make elections the primary method of selecting circuit judges.

The appointment process in Article V, section 11(b) merely enables the Governor to fill a gap in service by appointing a person for a limited period of time in which an office becomes vacant between elections. *See Spector v. Glisson*, 305 So. 2d 777 (Fla. 1974*);* *Pleus v. Crist*, 14 So. 3d 941 (Fla. 2009). Yet, to read the response submitted by the Secretary of State, one would think that the gubernatorial appointment process takes precedence over the election process.

In his response, the Secretary focuses exclusively on the appointment process in Article V, section 11(b), even going so far at one point as to say that "[t]he 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." (Response p. 6) (emphasis added). He treats the appointment process as though it is the dominant method of selecting circuit judges, which "yields" to the elective process only in limited situations. With due respect, the petitioner submits that the Secretary has this backward. The appointment process is the exception, not the rule.

II. The Governor lacks authority under the Florida Constitution to appoint Judge Shinholser's Successor.

The arguments made by the Secretary on this point are the same as those the Court rejected in *Spector v. Glisson*. In that case, Justice Ervin submitted his resignation in February of 1974, before the qualifying period for an election and

made his resignation effective on the last day of his term in office. Secretary of State Dorothy Glisson argued, as the Governor and Secretary Detzner does here, that Justice Ervin's seat must be filled by an appointment.

The Court concluded that the Governor's appointment power under Article V, section 11(a) does not take precedence over the right of the people to elect judges under Article V, section 10(a) of the Florida Constitution. Based on this conclusion the Court rejected Secretary Glisson's argument and held that the voters were entitled to select Justice Ervin's successor in an election.

It is true, as the Secretary has stated, that *Spector v. Glisson* was decided more than "four decades" ago. (Response p. 11). It is also true that there have been some changes in our Constitution in the interim. For example, in *Advisory Opinion to the Governor re Judicial Vacancy due to Mandatory Retirement*, 940 So. 2d 1090 (Fla. 2006), the Court noted that we now use a merit selection and retention system for appellate judges. In that case, the Court concluded that the holding in *Spector* does not apply to merit retention elections. Notably, however, the Court did not question the continued vitality of the holding in *Spector* in contested judicial elections in the trial courts. We still elect our trial judges and the constitutional provisions the Court interpreted and applied in *Spector* are essentially the same as those that are at issue here.

The appointment process bears the same relationship to the elective process now as it did then. The duration of an interim appointment is longer under the current version of Article V, section 11(b), but otherwise that provision is the same in all respects as the one the Court interpreted in *Spector*. Appellate judges are no longer elected in contested elections between competing candidates but in all other respects the provision of Article V, section 10 the Court was interpreting in *Spector* is the same as the current provision.

Moreover, the principles underlying the *Spector* decision have not changed. The Court concluded in *Spector* that the appointment process is subordinate to the elective process and made the following statements about the importance of preserving and protecting the elective process:

- The appointment process should be used "only in those instances where the elective process is not available." *Spector,* 305 So. 2d at 783.
- The Florida courts should not strain to interpret Article V, section 11(a) to "give priority to the appointive power over the paramount elective process." *Id.* at 783.
- "The nominating commission process in s. 11 of Art. V is really a restraint upon the Governor - not a new process for removing from the people their traditional right to elect their judges as provided in . . . s. 10 of Art V." *Id.* at 783.
- "[t]he Governor's judicial appointments are only interim appointments, in effect 'stop gap' measure until an election can be held." Id at 783.

These statements are as true today as they were forty years ago when *Spector* was decided. The election process is still the default method of selecting judges, and the citizens of this state have expressed their will to keep it that way. The current version of Article V, section 10(b) gives the voters a local option to switch over to a merit retention system but, so far, no county in Florida has exercised that option. Every one of them has decided to retain the system of electing circuit judges. The Court said in *Spector* that it has been the policy of this state to favor elections over appointments "since the earliest days of our statehood." *Spector*, 305 So. 2d 781. Nothing about that has changed.

The Secretary relies on a series of post-*Spector* cases in which the courts have held that a resignation before the qualifying period triggers the need for a gubernatorial appointment. (Response p. 7). However, as we pointed out in the petition, all of these cases involve situations in which the effective date of the resignation fell long before the end of the term, thus leaving the office unoccupied for a substantial period of time. (Petition pp. 12, 13). *See Advisory Opinion to the Governor re Judicial Vacancy Due to Resignation,* 42 So. 3d 795 (Fla. 2010) (an actual vacancy of seven months); *Advisory Opinion* to *the Governor,* 928 So. 2d 1218 (Fla. 2006) (an actual vacancy of seven months); *Pincket v. Harris*, 765 So. 2d 284 (Fla. 1st DCA 2000) (an actual vacancy of six months).

This important distinction was not addressed in the response. The Secretary relied on the holding *in In re Advisory Opinion to the Governor*, 600 So. 2d 460 (Fla. 1992) that an appointment was required, but failed to mention that the effective date of the resignation in that case left an actual vacancy in the office for a period of five months. The duration of the vacancy was the very point that prompted the Court to conclude as it did that the seat should be filled by an appointment. The Court reasoned that an appointment was necessary to prevent an "unreasonable vacancy" in the office. *Advisory Opinion,* 600 So. 2d at 463.

The point made in the petition in this case was that an actual vacancy of just two days is not comparable to an actual vacancy of five months. The response ignores this point altogether and perhaps for good reason. It would be difficult to explain how a vacancy of just two business days in the middle of the holiday season could be characterized as an "unreasonable vacancy" as that term was applied by this Court. *Advisory Opinion*, at 463.

And that is precisely the reason why this Court should reject the decision by the First District Court of Appeal in *Trotti v. Detzner*, 147 So. 3d 641 (Fla. 1st DCA 2014), the case that gave rise to the controversy in this case and others now before the Court. The *Trotti* court held as a matter of law that an actual vacancy of <u>any</u> duration, even a single day, is not "unreasonable." The court categorically stated, "we cannot engage in a determination of what does or does not constitute an

unreasonable vacancy warranting an appointment." *Trotti*, 147 So. 3d at 645. But that determination is directly contrary to the rationale of *Advisory Opinion*. If an appointment is required "because no unreasonable vacancy should exist" as the Court reasoned in *Advisory Opinion*, the court in *Trotti* should have considered the reasonableness of a one-day vacancy. *Advisory Opinion* at 463.

The *Trotti* decision does not carry any extra weight, as the response suggests, merely because this Court declined an opportunity to review it. (Response p. 9). This suggestion reflects a misunderstanding of the Court's discretionary jurisdiction. A denial of discretionary review is not a decision on the merits of the case. The Court may decline to exercise its discretionary jurisdiction for reasons that are unrelated to its view of the merits of a decision. The implication that this Court somehow put its stamp of approval on the *Trotti* decision by denying a request for discretionary review is simply not correct.

The Secretary argues that that the petitioner is attempting to "collaterally attack" the *Trotti* decision. (Response p. 2). That argument, too, lacks merit. The *Trotti* decision adjudicated the rights of the parties before the court in that case and it cannot be collaterally attacked by a decision in another case. If the Secretary meant only to suggest that the petitioner is urging the court to reject the precedent set in *Trotti,* he would be right. The *Trotti* case was incorrectly decided, as we

have explained, and there can be little question at this point that it is causing serious problems for the judicial system in this election cycle.

The weakness in the argument advanced by the Secretary is that it fails to consider the context in which the resignation was submitted. We acknowledge that a resignation by a circuit judge ordinarily triggers an appointment. That is the starting point of the analysis, not the conclusion. The question in this case is whether the Governor is entitled to make an appointment if the circuit judge who is resigning will not actually leave the office until the end of the term.

In this situation there is no need for the resignation and therefore no need for an appointment. The voters can select a new circuit judge in the election, and the new judge will take office at the beginning of the next term. What then is the purpose of the resignation? The answer is that it serves no purpose at all other than to defeat the rights of the voters by converting an election into a gubernatorial appointment.

There is no good reason why the voters in the Tenth Circuit should be deprived of their right to select Judge Shinholser's successor in the 2016 general election. His term expires at the end of this year. A candidate attempted to qualify for election to his seat. Because Judge Shinholser's resignation will not become effective until December 28, 2016, nearly eight months after the date of his resignation letter, he will be in office long after his successor would be selected by

the people. It is true that the office will be physically vacant for a period of four days before the start of the new term in the week between Christmas and the New Year, but that is hardly a reason to deny the voters the their rights under Article V, section 10(b).

It is clear from Judge Shinholser's own resignation letter that the "vacancy" is merely a nominal vacancy that was manufactured for the purpose of avoiding an election. To say that it is necessary to appoint his successor because the office will be unstaffed for two days would be to engage in a legal fiction that has no basis in reality.

II. Mandamus is the proper remedy

The Secretary contends that mandamus does not lie in this case because his authority to cancel the election has already been determined in *Trotti v. Detzner*. That is an argument that goes to the merits of the petition, not the propriety of the remedy. The point the Secretary is overlooking is that if this Court were to hold that *Trotti* did not apply the constitutional provisions at issue correctly (an option that is certainly within this Court's power) the result would be to hold that the Secretary lacks the authority to cancel the election.

The fallacy in the Secretary's argument is that it conflates ostensible authority with actual authority. The question presented by the petition in this case is whether the Secretary does or does not have constitutional authority to treat the

vacancy created by Judge Shinholser's resignation as one that will be filled by a gubernatorial appointment rather than an election. This question is not answered merely by pointing to a lower court decision that explains why the Secretary acted as he did.

The Secretary is relying on a lower court ruling, but this Court would have discretion to entertain a petition for writ of mandamus even if he had been relying on a state statute. *See Allen v. Butterworth*, 756 So. 2d 52 (Fla. 2000) (holding that mandamus is an appropriate remedy to challenge the constitutionality of a statute if "the functions of government will be adversely affected without an immediate determination") *see also, Moreau v. Lewis*, 648 So. 2d 124 (Fla. 1995). If a statute that purports to give a public official authority to take a particular action is unconstitutional, the action is without authority.

The same principle applies here. The petitioner contends that the Governor lacks authority under Article V, section 11(b) to appoint Judge Shinholser's successor and that the Secretary therefore has a duty to place the petitioner's name on the ballot. The Secretary's reliance on *Trotti* merely explains why he acted as he did. It does not give him authority.

The petitioner is not urging the court to "create new law" as the Secretary contends. (Response p. 1). The argument made in the petition was based on the text of Article V, section 10(b) and the decision by this Court in *Spector v. Glisson*.

As the Secretary acknowledged later in the response, the *Spector* case was decided "four decades" ago. (Response p. 11). The Secretary has contradicted himself on this point. In any event, it is clear that the petitioner is not attempting to make new law.

The argument in the petition was that there is no material difference between the vacancy in *Spector* and the vacancy in this case. (Petition p. 9). If the vacancy in *Spector* was to be filled by an election, as the Court held in that case, the same rule should apply here. There is nothing new about this argument. It is an argument that is based on the law as it has always been interpreted by this Court in the past. The more recent decision by the First District to the contrary does not make the argument new.

The Secretary contends that mandamus is not an appropriate remedy because the petitioner is really just objecting to the behavior of a few judges. (Response p. 1). His "true purpose," he says, is to advocate for a new rule of judicial administration that would prevent judges from manipulating the election process. (Response p. 14). These characterizations of the petition are grossly inaccurate.

In the section of the petition entitled "Nature of the Relief Sought" the petitioner requested the following relief in this Court:

> The petitioner respectfully requests that this Court issue a writ of mandamus directing the respondent to accept his qualifying papers, restoring the seat for Group 6 of the Tenth Judicial Circuit to an active status and adding the petitioner as an active and qualified candidate.

(Petition p. 20). That is all the relief the petitioner requested and it is based entirely on his argument that the Governor lacks authority under Article V, section 11(b) to appoint Judge Shinholser's successor. The petitioner did not seek judicial discipline. Nor did he seek the adoption of a new rule of judicial administration, as the Secretary suggests.

What the petitioner actually said is that the issue in this case "is not only a question of constitutional law, but also a question of judicial administration." (Petition p. 4) (emphasis added). He added that "if it becomes necessary to place a restriction on the length of an *in futuro* judicial resignation, in order to solve the broader problem presented by the case, this Court is the only court in Florida that would have the authority to do that." (Petition p. 4) (emphasis added). The petitioner went on to give an example of a rule that might prevent the problem in the future. (Petition p. 18, 19).

These points were made and developed in the petition for a simple reason; the relief the petitioner is requesting in his case will settle the present dispute between the parties, but it is not likely to solve the underlying problem. If the Court concludes that a vacancy of four days is not "unreasonable," it will not be long before someone tests the holding by creating a vacancy of fifteen days or thirty days. The petitioner was merely pointing out that this Court (and only this court) has the power to avoid this endless line-drawing exercise.

There can be no doubt that this case raises serious questions about the conduct and motivation of judges, but that does not make the constitutional law issue it presents any less important. The petitioner's argument is that the Governor lacks constitutional authority in these circumstances to make an appointment. The Secretary seems to be arguing that mandamus is not the proper remedy because the fault lies with a few judges and he is personally innocent of any improper motive. "These concerns have nothing to do with the petition," he says. (Response p. 13). But whether the Secretary is a fault is beside the point. The question here is whether the Secretary does or does not have authority to treat the vacancy at issue as one that must be filled by an appointment.

IV. The Court should direct the Secretary to accept the petitioner's qualifying papers and hold an election for the Group 4 Seat.

For these reasons, the petitioner respectfully requests a decision by this Court declaring that the Governor lacks authority under Article V, section 11(b) to appoint Judge Shinholser's successor, and directing the Secretary to hold an election and to accept the petitioner's qualifying papers.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by email to: General Counsel, Adam S. Tanenbaum (adam.tanenbaum@dos.myflorida.com), Assistant General Counsel, David A. Fugett (david.fugett@dos.myflorida.com), Florida Department of State, R.A. Gray Building, Suite 100, 500 South Bronough Street, Tallahassee, Florida 32399-0250; Glenn Burhans, Jr. (gburhans@stearsnweaver.com, cabbuhl@stearnsweaver.com) and Bridget K. Smitha (bsmitha@stearsnweaver.com), Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Highpoint Center, 106 East College Avenue, Suite 720, Tallahassee, Florida 32301, this 31 day of May 2016.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition complies with the font requirements of Florida Rules of Appellate Procedure 9.210(a)(2).

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