IN THE SUPREME COURT OF FLORIDA

ROBERT J. PLEUS, JR.,

Petitioner,

Vs. Case No. SC09-565

CHARLIE CRIST, GOVERNOR

Respondent

ON ORIGINAL PETITION FOR WRIT OF MANDAMUS

AMICUS CURIAE BRIEF OF THE FLORIDA STATE CONFERENCE OF BRANCHES OF THE NAACP ON BEHALF OF GOVERNOR CHARLIE CRIST, RESPONDENT

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INTEREST OF AMICUS CURIAE

The mission of the National Association for the Advancement of Colored People is to ensure the political, educational, social and economic equality of rights for all persons and to eliminate racial hatred and racial discrimination. The Florida State Conference of Branches of the NAACP serves as the voice for thousands of affiliates, associate members and minority civil rights across the State of Florida. State President Adora Obi Nweze advises the Honorable Charlie Crist, the respondent in the case at Bar, on issues involving civil and minority rights in Florida. The Florida NAACP has worked singularly and in conjunction with several voluntary bar associations to promote the concept of diversity in the judiciary.

We recognize that the gravamen of Judge Robert Pleus' (herein referred to as "Judge Pleus") Writ for Mandamus is for this Honorable Court to compel Governor Crist ("Governor") to appoint his successor in office from a list of candidates that has been tendered by the Fifth District Court of Appeal Judicial Nominating Commission ("Fifth JNC") .

Accordingly, we adopt the background and arguments contained in the governor's response to Judge Pleus.

The Florida NAACP shares the Governor's desire for a judiciary that reflects the rich diversity in the State of Florida. We believe that this is a case of great public importance in that the specter of racial discrimination has been raised with respect to the Fifth JNCs failure to forward the names of any African-American candidates, despite the fact that at least three "well qualified" African-Americans applied for the vacancy.

While there are several ripe issues, the Florida NAACP is specifically focused upon, first, whether discrimination is at the root of the lack of minority candidates for selection.

A second issue of great concern to the Florida NAACP as well as minority lawyers and citizens across the State of Florida is whether the rules governing the JNCs allow the Governor leave to obtain the requisite information to determine whether misconduct or discrimination has arisen that would warrant removal of commissioners(s).

ARGUMENT

A. THE GOVERNOR'S REQUEST THAT THE FIFTH JNC CONSIDER DIVERSITY IN ITS SELECTION FURTHERS A COMPELLING INTEREST TO COMPLY WITH FEDERAL AND STATE LAWS FORBIDDING RACIAL DISCRIMINATION

In 1972, the Florida Constitution was amended to create JNCs whose purpose included providing greater objectivity in the vetting and eventual selection of qualified judges.[1]

Since their inception there have been arguments raised both for and against the JNCs with respect to diversity. It is arguable that the best method for promoting diversity is through direct election of judges on all levels in Florida. Such arguments, however, have been relegated to the legislative process or academia for the last thirty years as Florida has consistently maintained merit selection for appellate level judges.[2]

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[1] Article V of Florida Constitution, 1972

[2] Former First DCA Judge Peter Webster provides an historical analysis of arguments both for and against merit selection of judges, including an analysis of its impact on diversity, in *Selection and Retention of Judges: Is there one "Best" Model*, 23 FSULR 1, Summer 1995.

Despite this continuing practice, merit selection does have its detractors, many of whom fear that the system is rife with bias on behalf of the well-connected and has a disparate impact on minorities.[3]

In Florida, there are separate JNCs for the Supreme Court, the district courts, and for circuit and county court vacancies. Each commission is required to adopt uniform standards and procedures which can only be repealed by action of both houses of the legislature or by the Supreme Court. The JNCs responsibilities commence when a vacancy has been duly noticed and is not completed until a selection is made by the Governor. [4]

In the case at Bar, the Governor's office received notice of Judge Pleus' resignation on September 8, 2008. The Fifth JNC then convened and received 28 applications. Included among this group were two African-American judges and one African-American attorney. [5]

One of the critical issues for the Florida NAACP is whether the Fifth JNC, acting under color of its Article V authority, has violated any state or federal laws prohibiting discrimination.

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[3] Id. at 12

[4] Article V sec. (11) (d) of Florida Constitution

[5] See Exhibit D of Judge Pleus' Petition for Writ of Mandamus

As this Honorable Court is well aware, the State of Florida and its assigns are subject to all applicable provisions of the Fourteenth Amendment to the United States Constitution as well as Title VII of the Civil Rights Act of 1964, which bans both private and public discrimination on account of race, creed, national origin and sex. Further, the state and its assigns are subject to the Florida Civil Rights Act of 1992.

Last December, the Governor forwarded a letter to Fifth JNC Chairman James Fallace (Chairman Fallace) acknowledging the initial list of nominees and reminding the chairman of his "commitment to diversity on the bench" while imploring the same to "give due consideration to diversity in the nominating process." Additionally, the Governor noted that "at least three well qualified African-Americans" applied for the nomination including the "Chief Judge of the Ninth Circuit" and a "Seventh Circuit Judge." The Governor concluded by asking the commission to "reconvene…and reconsider these important nominations and provide me with a list of nominees as soon as possible." [6]

As the Governor has addressed in his brief, there was an opportunity for the Fifth JNC to consider his request after the sixty days had lapsed, but they failed to do so.

[6] Id.

Chairman Fallace has indicated that in screening what he deemed to be "an extremely well qualified group" of applicants that the Fifth JNC used the criteria listed in the Standards and Qualifications Criteria section of the Uniform Rules of Procedure for DCA judicial nominating commissions. Also, Fallace wrote that the Fifth JNC considered Florida Statute 43.291(4), which requires consideration of the "racial, ethnic, gender diversity, as well as the geographic distribution of the population at issue."[7]

Fallace's statements, however, are not supported by the Fifth JNCs actions. As this Honorable Court is well aware, one of the most diversely populated regions within the Fifth DCA is the Greater Orlando area.

According to recent demographics, the African American population of Orlando is approximately 26.6 percent, and the Hispanic or Latino population is 17.7%.[8]

Despite the vast numbers of African-Americans and Hispanics in this district, the Fifth DCA has no African-American or Hispanic judges.[9]

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[7] Id. at Exhibit E

[8] Excerpted from the City of Orlando Website

[9] N.B. that Judge Emerson Thompson, an African-American, has served as a senior judge on the district court since retiring from active service in January of 2008.

Accordingly, the Florida NAACP contends that Governor Crist was well within his constitutional authority when requesting that diversity be considered.

A. The Fifth JNC's nominations lack diversity.

Implicit within the debate about the constitutional authority of the contending parties at Bar is the lack of diversity in Florida courts, in general, and the 5th DCA in particular. Florida is the nation's fourth most populous state with an African-American population of nearly 16%, and an Hispanic population of approximately 19 %.[10]

The Governor has indicated "a commitment to diversity on the bench."[11] In furtherance of this desire, over the past year the Governor has appointed a number of well qualified minority judges to benches across the State of Florida.[12] Despite the Governor's best efforts, there remains a dearth of minority names being forwarded to his office for consideration by the respective JNCs.

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[10] Excerpted from the United States Census Bureau website

[11] Pleus Petition, Exhibit D

[12] Since assuming office in January of 2007, Governor Crist has appointed 9 African Americans, 9 Hispanics, and two judges who identified themselves as "other" to benches ranging from the county court level to the Florida Supreme Court.

Since 2006 there have been 79 judicial vacancies of varying levels in the State of Florida.[13] Florida JNCs forwarded 399 names to the Governor for consideration. Of this number, only 35 African-Americans and 36 Hispanics were nominated.

The paucity of minority judges is far more pronounced in major urban areas. A prime example is the Seventeenth Judicial Circuit, which includes Broward County. Statistics show that the total African-American population of Broward County is 35%, including Haitian-Americans. At present, the Seventeenth Judicial Circuit has approximately 90 active county and circuit judges. Of these 90 judges, only five are African-American.[14]

B. The excluded African American applicants were "well qualified".

The Florida NAACP recognizes that one of the more insidious arguments of diversity opponents is that a commitment to diversity is seemingly tantamount to supporting lower standards or qualifications.[15] We reject such arguments as patently absurd.

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[13] Statistics obtained from Governor Crist's office.

[14] Statistics obtained from Broward County website and the Broward NAACP.

[15] Opinion and comments excerpted from South Florida Sun Sentinel Editorial Board's April 10, 2009 opinion entitled "Crist's well meaning delay in picking minority judges is hurting more than it is helping."

Such arguments are allowed to fester in the public arena in many respects because the term "qualified" is inherently subjective and, absent a pedantic list of objective criteria for consideration, could be subject to malfeasance.

However, from an objective standpoint, under Florida Law, a candidate for county or circuit judicial judgeship must possess the following criteria:

a. A citizen of the country or circuit for which he/she is applying,
b. A member of the Bar in good standing for five years.

The same criteria hold true for appellate level judges with one difference---that candidates must have been members of the Bar for the preceding ten years.

Arguably, the minimum objective criteria allow a great number of the Bar's active membership to serve as jurists. However, other factors are weighed during the screening process including a background check and personal interview, where commissioners can ascertain more information about a prospective candidate's legal and personal background.

Commissioners are also able to discover the types of cases an applicant has prosecuted; to obtain statements from lawyers or judges who have worked with the applicant previously; and also to solicit information from the general public. These efforts, theoretically, assist commissioners in determining whether an applicant has the intellectual acuity and moral standing to serve on the bench.

In the instant case, Chairman Fallace indicates that the Fifth JNC screened a number of "well qualified applicants."[16] Included among this group were Circuit Judge Belvin Perry, who has served as Chief Circuit Judge of the vast Ninth Judicial Circuit that includes the Greater Orlando area; and Seventh Judicial Circuit Judge Hubert Grimes, who was appointed to the circuit bench by then-Governor Jeb Bush in 1999, after having served for over a decade as a county court judge in Volusia County.

As such, there is little dispute that the African-American applicants were well qualified. Despite being qualified and living in a district with a large population of African-American residents, neither of these African-American applicants was forwarded to the Governor for consideration. The Florida NAACP avers that this reaches beyond oversight and that at a minimum; the specter of discrimination has yet to be ruled out when considering the Fifth DCA's refusal to balance the qualifications of all applicants with the region's demographics.

B. THE FLORIDA SUPREME COURT SHOULD EXERCISE ITS AUTHORITY TO AMEND THE RULES OF THE STATE JNCs TO ALLOW THE EXECUTIVE BRANCH TO OBTAIN DISCOVERY THAT WOULD HELP DETERMINE WHETHER MISCONDUCT OR DISCRIMINATION HAS BEEN COMMITTED BY A JNC

[16] Pleus Petition, Exhibit E

The Florida Constitution establishes Judicial Nominating Commissions as independent constitutional bodies.[17] As this Honorable Court is well aware, initially, the JNCs were not subject to Florida's "government in the sunshine laws."[18]

Article V section (11) (d) was amended in 1984 to provide the general public access to the JNCs with one caveat---that deliberations "may be closed to the public and the press.[19] At present, the procedures for each JNC in Florida disallow any access to vote sheets, tally sheets or deliberation transcripts. In ***Justice Coalition vs. The First District Court of Appeal Nominating Commission,*** 823 So. 2d 185 (1st DCA 2002), the court acknowledged that JNC deliberations were not subject to public review and, as such, tally sheets and ballots were similarly exempt.

In its holding, the court quoted the following from the Florida Statutes Annotated discussion of Article V, which reads:

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[17] Article V of Florida Constitution

[18] See ***Kanner vs. Frumkes***, 353 So. 2d 196 (Fla. 3d DCA 1977) where the court held that "the functioning of the judicial nominating commissions being executive in nature…it is clear that these commissions are not subject to Section 286.011" or the Sunshine Law.

[19] See article V sec. (11) (d), 1984 amendment

> "Attempts to open the deliberation portion of the process to the public have been met with resistance from many who believe it would be a chilling effect on the commission members' candor in discussing judicial candidates. Supporters of removing the confidentiality requirements have argued that the deliberations of the judicial nominating commissions should be open to the public to avoid the use of hearsay and rumors and to assure that the selection process is free from personal bias." [20]

The Florida NAACP argues that the current JNC rules allow for commission members to consider hearsay and rumors, and that the rules fail to provide any measure of accountability in the event of misconduct or discrimination by a JNC or its individual members.

Under Florida Statute section 43.291 sub-sec. 5, "a member of a judicial nominating commission may be suspended for cause by the governor." At present, the Governor has no authority to access information with respect to potential misconduct or discrimination by the JNCs to aid in his determination as to whether suspension or removal is warranted.

[20] Id at 191

Without the ability to obtain notes, tally sheets or deliberation transcripts to investigate wrongful conduct by a JNC, any investigation by the Governor would be moot.[21]

As this Honorable Court well knows, under Article V the procedures for each JNC can be changed by either legislative action or "by a 5-2 majority vote of the Florida Supreme Court."[22]

Accordingly, the Florida NAACP respectfully requests that this Honorable Court exercise its Article V powers and amend the JNC rules of procedure to allow a governor to obtain the requisite documents and transcripts to investigate misconduct or discrimination within the nominating process.

CONCLUSION

[21] The Florida NAACP, when considering legal action against the Fifth DCA, realized that the holding in *Justice* restricts Discovery that would help determine whether an action for discrimination is warranted.

[22] article V sec (11) (d)

It is undisputed from the record evidence that "well qualified" African-American candidates were a part of the pool of applicants for the 5th DCA vacancy. It is also undisputed that said District has a significant African-American population and no African-Americans actively serving on the Bench.

The Florida NAACP, as well as the general public, has yet to learn why none of the "well qualified" African-Americans was forwarded to the Governor for consideration. The lack of inquiry is due in large measure to the fact that under the existing rules, the Governor is unable to obtain information that could determine whether misconduct or discrimination has occurred. As such, the Florida NAACP respectfully requests that the Writ be denied and that this Honorable Court exercise its authority to amend the JNC rules to allow the Governor to obtain the requisite information to thoroughly investigate misconduct and/or discrimination.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief was written in a proportionally spaced Times New Roman 14 point font in compliance with Rule 9.210 (a)(2) of the Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate representation of the foregoing has been served via US Mail and/or hand delivery to Talbot D'Alemberte, Esquire, counsel for Petitioner, Judge Robert Pleus, Jr., 1117 Myers Park Drive, Tallahassee, Florida 32301; Jason Gonzalez, Esquire, Rick Figlio Esquire and Carly Hermanson, Esquire, counsels for Respondent, Governor Charlie Crist, Executive Office of the Governor Room 209, The Capitol, Tallahassee, Florida 32399; and Siobhan Helene Shea, Chair, Appellate Practice Section, the Florida Bar, PO Box 2436, Palm Beach, Florida 33480.

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