

IN THE SUPREME COURT  
OF FLORIDA  
CASE NUMBER:  
L.T. CASE NUMBER: 98-13485 (12)

PHYSICIANS HEALTHCARE  
PLANS, INC. ,

Petitioner,

vs.

PETITION FOR WRIT OF  
PROHIBITION

RAYMOND PFEIFLER and  
CYNTHIA PFEIFLER, his wife,

Respondents.

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Petitioner PHYSICIANS HEALTHCARE PLANS, INC. (“PHP”) respectfully petitions this Honorable Court for issuance of a writ of prohibition, prohibiting non-elected, former circuit judges comprising the Seventeenth Judicial Circuit’s “senior judges docket” from presiding over trial of the above-styled case and prohibiting the presiding chief judge from making future assignments to the “senior judges docket” that would violate Florida Constitutional requirements that senior judges must be “retired” and qualified, and from making assignments that infringe suffrage rights or create special divisions contrary to law. Co-defendants in the trial court, RONALD S. GUP, M.D., RONALD S. GUP, M.D., P.A., RALPH

GREENWASSER, JR., D.O. and RALPH GREENWASSER, JR., D.O., P.A., join in this Petition by separate notices of joinder that are submitted simultaneously herewith.

## **I. JURISDICTION OF THIS COURT**

Jurisdiction of this Court is invoked pursuant to Article 5, Section 3(b)(7), Fla. Const., and Rule 9.030(a)(3), Fla. R. App. P. Further, under Wild v. Dozier, 670 So. 2d 16 (Fla. 1996), this Court has exclusive jurisdiction derived from Article 5, Sections 2(a) and (b), Fla.Const., to review judicial assignments.

## **II. FACTS ON WHICH PETITIONERS RELY**

### **A. Introduction:**

Article V, Section 2(b), Fla.Const., gives the Chief Justice the authority to make temporary assignments of retired judges. This power may be delegated to the chief judges of the circuit courts. This Court has implemented this section by means of a Memorandum in 1991. App.1-5<sup>1</sup>. The chief judge of the Seventeenth Judicial Circuit has issued Administrative Order I-92-J-1 similarly implementing the power of appointment in that court. App.6. This Court has annually approved a list of persons whose names were submitted by the Seventeenth Circuit as being eligible to serve as

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<sup>1</sup>References are to pages of the accompanying appendix. All emphasis is added unless otherwise indicated.

appointed retired judges. App.7-9.

This petition challenges the transfer of the instant case to the “retired judges docket” pursuant to the practice of the Seventeenth Judicial Circuit of maintaining a complex case division having a perpetual trial calendar for all cases with anticipated trial durations in excess of two or three weeks, and which is staffed by non-elected senior judges.

Petitioner submits that the current complex case division practice which has resulted in the transfer of this case to the senior judges docket offends the constitutional limits placed upon the appointive power of the chief justice. These limits arise from the constitutional rights of suffrage and from the constitutional prohibition of local specialized divisions. Petitioner suggests that the constitutional difficulties evident in this case and in the complex case division staffed by senior judges in the Seventeenth Judicial Circuit may be resolved by clarifying the necessity of case-by-case consideration of the special circumstances and emergencies described in this Court’s Memorandum of 1991 addressing the use of senior judges and by application of the priorities, procedures, and cautions set forth therein.

Petitioner further submits that the list of senior judges includes persons who are not qualified under the constitution because they do not meet the constitutional definition of the term “retired” and because they do not meet the current

constitutional requirement of residency.

**A. The Seventeenth Judicial Circuit’s complex case division, staffed by senior judges:**

The Seventeenth Circuit maintains a separate docket for trials of complex cases before those persons listed and approved by this Court as senior judges.<sup>2</sup> This special docket is known as the “senior judges docket.” It is “really (the) complex litigation division” for the Seventeenth Circuit. App.10-33 at 13. Each of the fourteen civil general jurisdiction divisions are allowed to send cases to this docket. *Id.* at 13. Thus, in the Seventeenth Circuit, complex cases are transferred to this specialized division which maintains a perpetual trial docket which is called once every nine or ten months. *Id.* at 16. One of the effects of this practice is evident in the current senior judges docket, which reveals that most of the cases are medical malpractice cases. App.27-33.

Upon assignment to the senior judges docket the litigants are not informed of the identity of the person to be appointed to preside over their trial. E.g., App.34; App.10-33 at 16.

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<sup>2</sup>As will be seen in discussion infra, the term “retired” has a limited meaning, but has been impermissibly expanded in the appointment process. Petitioner uses the term “senior” to avoid confusion regarding the popular versus the constitutional use of the term “retired.”

The chief judge routinely appoints persons by successive month-to-month orders. App. 40-224. Occasionally specific judges are appointed to specific cases. *Id.* at 44; App.225-232 (summary of App.40-224). None of the specific appointments is directly at issue in this case. However, some may be affected by implication if the Court agrees with the last two issues raised by this Petition.

**B. This Court's implementation of the constitutional power of appointment given to the chief justice:**

This Court has established certain categories of need and certain procedures to be followed in appointing senior judges in its Memorandum of 1991. App.3-4. Eleven categories of need appear, including such needs as the incapacity of an assigned judge. App.3, ¶b.(6). In addition, this Memorandum sets forth procedures by which the transferror judge must seek assistance from an active judge, circuit or county, prior to assignment to a senior judge. App.3, ¶a. Finally, the Memorandum discourages assignment of a complex case to a senior judge for practical reasons relating to the nature of the litigation and the needs of the litigants for the judge's continued involvement. App.4.

This Court further requires reporting of all appointments of senior judges., indicating the reason for the judge's appointment. App.4. The total "judge

days”<sup>3</sup> used by each circuit are compiled by category. The compilations for the fiscal year 1999-2000 appear at App.254-255.

The vast majority of the senior judge days<sup>4</sup> allocated to the Seventeenth Circuit, 80% for fiscal year 1999, are described as being used for the generalized purpose of relieving “backlog,” a category not contained on this Court’s June, 1991 Memorandum. App.250-251. The second-most common justification is the accommodation of “long” trials, priority number eleven. App.254-255.

By contrast, higher-ranking priorities in the Order and Memorandum almost never appear in the Seventeenth Circuit, e.g., priority one, unforeseen short term illness and six, incapacity of a judge. *Id.*; App.238; App.3.

**C. How the instant case was placed on the “senior judges docket”:**

This medical malpractice case was assigned by blind rotation to division 12 (J. John A. Miller, now J. Charles M. Greene). App.257-322.

Judge Greene later entered an order setting trial on the senior judges docket,

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<sup>3</sup>Retired judges’ pay is per diem. Legislative appropriations are made on the number of judge days projected for each circuit. App.240.

<sup>4</sup>The legislative appropriations are based upon a daily rate of pay for service by a senior judge. Accordingly, budget requests and allocations to each circuit by this Court are also based upon the anticipated number of “days” of service by senior judges. App.240.

“the above-styled cause ... is hereby set for Jury Trial on \*(to be set on the Senior Judges’ Docket; courtroom and date to be set).

App.34. Also, see App.323, where Judge Greene again re-submitted this case for assignment to the senior judges trial docket.

On July 26, 2000, Petitioner PHP filed a motion to return the case to the elected judge. App. 325-326. Co-defendants RONALD S. GUP, M.D. and RONALD S. GUP, P.A., and EMSA SOUTH BROWARD, INC., SOUTH BROWARD HOSPITAL DISTRICT d/b/a MEMORIAL REGIONAL HOSPITAL, and KHURSHID KHAN, M.D., joined in the motion. App.327, 330.

On November 6, 2000, the court heard argument challenging such assignments and denied the motion to return the case to its assigned judge. Nevertheless, the issues were certified as being of great public importance<sup>5</sup> and Petitioners were invited to seek a writ of prohibition to resolve the points presented. App.334.

On February 16, 2001, calendar call was held. App.12. This case was later taken off that docket due to an Amended Complaint taking the case out of issue, and was recently re-submitted by Judge Greene, at Plaintiff’s request, to the senior

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<sup>5</sup>Certification is superfluous to this Court’s jurisdiction but emphasizes the continuing interest of the court and practitioners in resolving the litigants’ rights.

judge's docket. App.333. Trial is now set in January, 2002.

### **III. NATURE OF THE RELIEF SOUGHT**

Petitioners seek relief under this Court's authority to issue writs of prohibition and all writs necessary to the complete exercise of its jurisdiction. A writ of prohibition is appropriate to prevent a lower court from acting beyond its powers; it is "designed to prevent the exercise of unlawful jurisdiction and is negative in nature." Harris v. McCauley, 297 So. 2d 825, 828 (Fla. 1974), relying upon Wincor v. Turner, 215 So. 2d 3 (Fla. 1968); Crill v. State Road Department, 117 So. 795 (Fla. 1928). The all-writs jurisdiction of this Court permits the Court to issue all writs that are necessary to the complete exercise of its jurisdiction. Couse v. The Canal Authority, 209 So.2d 865 (Fla. 1968). The remedy for the unconstitutional assignment of a senior judge is prohibition. Wild v. Dozier, *infra*.

Under the all-writs jurisdiction this Court may additionally issue directives to the Seventeenth Circuit to prevent future temporary appointments that would offend the constitutional rights of litigants.

Petitioners therefore request the following relief:

1. Prohibition of any of the senior judges from presiding over the trials of the instant case;
2. Prohibition of further future transfers that fail to conform with the

applicable Florida Constitutional provisions and this Court's Memorandum implementing them.

#### **IV. ARGUMENT**

For the reasons that follow, Petitioners respectfully submit that the orders at issue and the challenged practices violate Florida Constitutional provisions limiting the chief justice's power of appointment, i.e., those provisions prohibiting creation of specialized divisions and creating an elected judiciary. These constitutional infirmities may arise from or be potentially resolved by clarification of the constitutional underpinnings of the limitations on appointments set forth in this Court's Memorandum on the use of retired judges issued in 1991. Further Petitioner submits that the constitution permits appointment of only qualified "retired" judges who reside in the geographic territory of the court.

**A. The "Senior Judges' Docket" violates the Constitutional prohibition against creation of special divisions:**

Article V, Section 7, Fla.Const., provides that no specialized division may be created except by general law. Section 43.30, Fla.Stat., provides that divisions may be created by a local rule which is approved by this Court. A division not created by local rule is impermissible. Hartley v. State, 650 So. 2d 1044 (Fla. 4th DCA 1995). A special division may not be created by means of the appointment power of the chief

justice as delegated to the chief judges of the various circuits. Payret v. Adams, 500 So. 2d 136 (Fla. 1986). See, Williams v. State, 596 So. 2d 791 (Fla. 4th DCA 1992), in which Judge Farmer in dissent observed that a “division” of the circuit court staffed solely by county judges serving successive “temporary” assignments runs afoul of Payret v. Adams, 500 So. 2d 136 (Fla. 1986).

In Payret, for reasons of geographic convenience, a chief judge appointed a county judge at a satellite courthouse to preside over circuit felony trials there, rather than conduct those cases before circuit judges in the main courthouse. This Court disapproved that practice as exceeding the judicial power of appointment and as constituting a permanent de facto assignment and the creation of a special division.

Administrative Order I-92-J-1 is not general law. Nevertheless, it has been used to create and maintain the complex case division for the Seventeenth Judicial Circuit staffed solely by senior judges.

Because the Seventeenth Circuit has not adopted a local rule, and this Court has not approved a rule creating a senior judges docket to hear all complex civil cases, the Seventeenth Circuit’s “complex case division”, staffed for trial exclusively by senior judges, runs afoul of the Constitutional prohibition against specialized divisions and of Payret.

Petitioner is aware that this Court has held that an existing subject matter

division of the circuit court may be further divided into specialized subdivisions by administrative order, but submits that the subdivision which this Court previously approved was staffed by active (elected) circuit court judges. Mann v. Chief Judge of the Thirteenth Judicial Circuit, 696 So. 2d 1184 (Fla. 1997)(approving creation of drug division of criminal court by administrative order).<sup>6</sup> Consequently, Petitioner submits that Mann is inapposite.

Petitioner submits that this case is controlled instead by Payret, in which the office of the criminal court was filled indefinitely by a county court judge, not a circuit court judge. This complex case division is similarly staffed by persons who are not circuit court judges; it is staffed exclusively by retired judges.

Petitioner further submits that, aside from the technical distinctions between the senior judges docket and the situation seen in Mann, some aspects of the reasoning set forth in Mann are inapplicable to the instant case. This Court in Mann observed that requiring “every specialized section of the major subject-matter divisions

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<sup>6</sup>Mann has since been followed in the case of “career criminal” or “habitual offender” subdivisions in the First District. Jenkins v. State, 685 So. 2d 918 (Fla. 1st DCA 1996); Dennis v. State, 673 So. 2d 881 (Fla. 1st DCA 1996). The Fourth District Court of Appeal has extended Mann to a “Division FS” in the Seventeenth Judicial Circuit’s criminal division, which was staffed solely by senior judges. Robertson v. State, 719 So. 2d 371 (Fla. 4th DCA 1998). Petitioner submits that Robertson is wrongly decided and should be disapproved for the reasons stated herein. It does not appear that that division was dedicated to a particular subspecialty like “complex cases” or “career” or “habitual” criminals.

of a court to be approved by local rule would place too great a burden upon the efficient administration of justice.” Mann, 696 So. 2d 1184. However, this comment appears to presume a regular necessity to create sections of major subject-matter divisions. In the case of the Seventeenth Judicial Circuit, though, there are no other specialized subdivisions of the circuit court. The only other “specialized subdivision” that has existed in this circuit in the recent past was the “tobacco” subdivision. That subdivision, though, was disbanded shortly after it was challenged in this Court.<sup>7</sup>

In any event, even were the tobacco division still in use, the adoption of a local rule for the purpose of creating just two subspecialties is not “too great a burden upon the efficient administration of justice.” Id.

Finally, Petitioner suggests that the reasoning of the Fourth District Court of Appeal that was quoted with apparent approval in Mann is a bit of a tautology. That court stated that “[S]ection 20(c)(10) of Article V only requires the establishment of subject matter divisions, i.e., criminal, civil, juvenile, probate, and traffic ....” Id.

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<sup>7</sup>A Petition for Writ of Prohibition was filed in this Court, challenging the “tobacco” division as violating the same constitutional and statutory provisions relied upon in this case. Brown & Williamson Tobacco Corporation v. Schneider, Case Number: 90,605. The Petition was denied without opinion and is thus non-precedential. Lacking the benefit of the Court’s reasoning for its denial, this Petitioner cannot address it. The “tobacco” division certainly seemed to constitute a “subject matter” that would be controlled by Article V, Section 20(c)(10), Fla. Const. Petitioner urges the Court to examine the arguments presented herein afresh.

(naming only those that have **already** been created pursuant to the requirements of the constitution). However, under the reasoning of Mann, had each of those divisions not already been constitutionally created and were a circuit court considering the creation of those “subject matters,” each could be viewed as subspecialties: criminal and civil are subspecialties of circuit court, juvenile is a subspecialty of criminal, probate is a subspecialty of civil, and so forth. They are only now labelled as “subject matters” because they have already been created pursuant to the requirements of the constitution. In other words, the constitution does not spell out at what point a “subspecialty” of a “subject matter” which Mann permits to be created by administrative order rises to the level of a “specialty” for which the constitution prohibits creation by any means other than general law.

Petitioner submits that the distinction between “special” and “subspecial” is indistinct and ambiguous. Petitioner therefore submits that a practical view of the actual needs for “efficiency” on the part of the circuit attempting to create a special division as well as of the volume and type of litigation to be shunted into the new division must be considered. In the instant case, routine transfer of every case that might take more than ten days to try, a practice which has the effect of removing most medical malpractice cases from the otherwise properly constituted divisions, in a circuit which has no other specialized civil divisions, should only be done if such a

division is created by local rule. The bench, the bar, and the public should have the opportunity to address the wisdom and logistical considerations of such a proposal before its implementation.

Accordingly, Petitioner submits that the “complex case division” violates the constitutional provision restricting the creation of special divisions.

**B. Assignment to the senior judges docket for complex cases violates Petitioners’ rights of suffrage:**

**i. The retained power of the people and the right of suffrage are paramount:**

Article 1, Section 1, Fla. Const. (1968) states:

All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

This provision commences the first article of the constitution, the Declaration of Rights, which this Court has described as “so basic that the founders accorded them a place of special privilege.” State v. Traylor, 596 So. 2d 957, 963 (Fla. 1992). These rights are the foundation of the tripartite system of government and enjoy an especially vigilant guard in the scrutiny of the courts, requiring liberal construction in favor of those rights. See generally, Palm Beach County Canvassing Board v. Harris, 772 So. 2d 1220 (Fla. 2000), rev’d., 121 S.Ct. 471, 148 L.Ed.2d 366 (11th Cir. 2000). These rights are emphasized by the first provision of the

constitution declaring that all power inheres in the people. Fla. Const., Art. I, Section 1.

In Palm Beach County, supra, this Court reaffirmed the importance of these rights:

It is significant that our Constitution thus commences by specifying those things which the state government must not do, before specifying certain things that it may do. These Declarations of Rights ... have cost much, and breathe the spirit of that sturdy and self-reliant philosophy of individualism which underlies and supports our entire system of government. ... They say to arbitrary and autocratic power, from whatever official quarter it may advance to invade these vital rights of personal liberty and private property, ‘Thus far shalt thou come, but no farther.’

*Id.* at 1236, quoting State v. City of Stuart, 120 So. 335, 347 (Fla. 1929).

Unreasonable or unnecessary restraints on the elective process are thus prohibited under the constitution, for “the right of the people to select their own officers is their sovereign right.” Treiman v. Malmquist, 342 So. 2d 972, 975 (Fla. 1977).

Article V, Section 10 (b), Fla. Const. (1976), provides:

**Circuit judges** and judges of county courts **shall be elected** by vote of the qualified electors within the territorial jurisdiction of their respective courts. The terms of circuit judges shall be for six years. The terms of judges of county courts shall be for four years.

The sovereign right of the people to select their own officers thus extends to the office of circuit and county judge.<sup>8</sup>

In 1998, the Judicial Nominating Procedures Committee, the Judicial Administration, Selection and Tenure Committee, the Commission on the Merit Selection and Retention of Trial Judges, and the Florida Bar all supported proposed Revision 7 regarding the judiciary. 73-Jun Fla. B. J. 54, 72, 73; 43 FLA. L. REV. 529, 531 (July 1991). Upon its adoption, this revision gave voters of each circuit and county the right to decide whether to continue to elect circuit and county judges or to adopt a “merit” selection process. The choice was to be put to the voters beginning with the November, 2000, elections.

Despite adoption of this constitutional revision by the voters of the state as a whole, by which the elective nature of the office could be changed on a county by county basis to an appointive office, the voters of the Seventeenth Judicial Circuit,

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<sup>8</sup>A short history of the elective nature of the office appears in McClellan, Madison B., Merit Apppointment versus Popular Election: A Reformer’s Guide to Judicial Selection Methods in Florida, 43 FLA. L. REV. 529 (July 1991). When Florida became a state, judges were appointed. In 1852, the constitution was amended to require election of circuit judges. In 1868, the federal government required Florida, as a “rebellious” state, to convene a constitutional convention over which it presided. The constitution was amended to provide for appointment of judges. In 1885, the constitution was amended to require election of supreme court judges. In 1942, election of circuit judges was restored. In 1976, supreme court judges were made appointive offices again.

as well as the neighboring Fifteenth and Eleventh Circuits, resoundingly rejected the newly created option of merit selection and retained the method of election.<sup>9</sup>

The newly reaffirmed constitutional right of the people to elect circuit and county judges is limited only by the rights of the governor and the chief justice to make temporary appointments.

Under Article V, Section 11 (b), Fla. Const., the governor appoints circuit judges to fill vacancies for limited periods of time.

A power of appointment is created for the chief justice of this Court by Article V, Section 2(b):

The chief justice of the supreme court shall be chosen by a majority of the members of the court. He shall be the chief administrative officer of the judicial system. He shall have the power to assign justices or judges, including consenting retired justices or judges, to temporary duty in any court for which the judge is qualified and to delegate to a chief judge of a judicial circuit the power to assign judges for duty in his respective circuit.

This appointive power is limited: the appointee must consent, must be retired and qualified to serve in that court, and must be appointed only for

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<sup>9</sup>This Court may take judicial notice of the results of the November, 2000, elections. A separate request to take judicial notice is filed herewith. See, McMahon, P., Broward to Keep Electing Trial Judges, South Florida Sun-Sentinel (Nov. 8, 2000), 2000 WL 28989049; Bushouse, K., County to Keep Electing Judges, South Florida Sun-Sentinel (Nov. 8, 2000), 2000 WL 28987806

“temporary” duty.

These two appointive powers are subordinate to Article V, section 10(b), for the right of suffrage is the preeminent right in the Declaration of Rights. Spector v. Glisson, 305 So. 2d 777 (Fla. 1974).

In 1995, this Court explained:

Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice.

Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975).

As this Court so soundly reasoned in the recent Bush/Gore constitutional challenge:

...technical statutory (or rules) requirements must not be exalted over substance of the right safeguarded in each voter to express his or her will in the context of a representative democracy.

Harris, *supra*, at 31.

Spector, *supra*, presented the question whether a Justice’s letter of resignation specifying an effective date in the future created a present vacancy which

would require filling by election in the already scheduled upcoming general election. If there were no present vacancy, then the effective date of resignation in the following January, after the upcoming general election, would constitute a vacancy that the executive power of appointment could fill.

In deciding that the vacancy was “present” and required filling by the upcoming general election, this Court ruled that the provisions of Article V, Section 10 are the “prime and basic provision and precept of Art. V.” The Court explained:

.... The subsequent provision for filling vacancies is subordinate and supplementary thereto. This view is consistent with the traditional treatment accorded to the elective process in this free nation of, by and for the people.

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 ....

Id. at 781.

Under Boardman, the right to vote includes the right to be heard. Under Spector, the right to vote includes the right to have public officials be the choices of the people. Id., at 782, 784. The right to vote thus includes the right to be represented by an electee. See, In re Apportionment, 414 So. 2d 1040, 1049-1050 (Fla. 1982).

In In re Apportionment, supra, Justice Boyd explained the principle of representation saying:

The [elected official] hears from the voters during election campaigns and because he presumably knows the will of the people in the geographic area that person is chosen by the electors to represent them and express their views ...

Id., at 1053 (J. Boyd, concurring specially). He further explained the constitutional infirmity of changing the constituency so that the elected official is no longer representative:

...a senator with a background in agriculture might be chosen by voters in a district because of his views about farming matters, but if his agricultural constituency is removed to another district and in exchange he is given a tourist oriented area of people opposed to his views on agriculture he no longer speaks the voice of the people...

Id.

Justice McDonald also affirmed the essential relationship between an elected official and his geographic constituency by stating, “Districts are constituencies, and it is to these constituencies that the senators must remain accountable.” He stated that the right to vote is the “right to vote **for the[official] who represents you.**” Id., at 1054 (J. McDonald, concurring). See, also, Id., at 1055 (“the right ... to vote for being represented by a senator elected solely by them”).

Although the representation of a constituency by an elected judge is

somewhat less conspicuous due to the nature of the office as consisting in the application of statutory and decisional law, it nevertheless exists. There is substantial and significant opportunity for the exercise of judicial discretion and for the application of equitable considerations so that the views of the judge are of great importance to the electors. The primary purpose of election of judges is to make them accountable to the people. See, Webster, Peter D., *Selection and Retention of Judges: Is There One ‘Best’ Method?*, 23 FLA. ST. U. L. REV. 1, 5 (1995). The need for accountability stems from the reality that judges are not merely “living oracles” as described by Blackstone. Id. at 4. Instead, today’s judges are often involved in making policy decisions and are thus like legislators. McClellan, Madison B., *Merit Appointment Versus Popular Election: A Reformer’s Guide to Judicial Selection Methods in Florida*, 43 FLA. L. REV. 529, 543 (1991). In some respects, judges have more power than legislators, because they are able to “thwart the will” of the majority. Webster, supra, at 9. The constitutional provision of an elected judiciary recognizes and protects the realities of this relationship between the electorate of the county or circuit and the judges presiding over their concerns.

Consequently, because the right of suffrage is preeminent and the power of appointment is subordinate, because the right to vote includes the right to be represented by an electee, and because the relationship between the elected official and

the constituency are the essential element of the democratic process and system, special circumstances must exist to support the use of the appointive power.

ii. **Exigencies to justify a temporary appointment must rise to the level of an emergency of the public business:**

According to Spector, supra, appointment must be justified by the “emergency of the public business” and the lack of availability of an elected official:

‘It has been said that the only excuse for the appointment of any officer made elective under the law is founded on the emergency of the public business...’ [cites omitted]

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... 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, supra, 305 So.2d at 781, 782.<sup>10</sup> This Court continues to recognize that

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<sup>10</sup>E.g., in Rivkind v. Patterson, 672 So. 2d 819, 820 (Fla. 1996), the public emergency that supported the appointive power was “the extreme importance of having domestic violence issues addressed in expeditious, efficient, and deliberate manner.”

restrictions on the elective rights of the people must be reasonable and necessary - an unreasonable or unnecessary restriction is unconstitutional. Trieman v. Malmquist, 342 So. 2d 972, 975 (Fla. 1977); Pasco v. Heggen, 314 So. 2d 1 (Fla. 1975).

In the instant case, there is no exigency creating an emergency of the public business. To the contrary, there is a standing practice of routinely transferring complex cases to the senior judges docket.

Accordingly, the appointment at issue is not constitutionally permissible. Restriction of the right to elect judges to preside over the trials of the public in the instant case and as a result of a routine practice is not justified by emergency or necessity and is, therefore, unreasonable. The explicit decision of the voters of the Seventeenth Judicial Circuit to continue to elect circuit and county court judges is systematically vetoed by this incontestable<sup>11</sup> routine practice of transferring cases over the objections of the litigants.

The use of the senior judges docket as a complex case division directly violates the litigants' rights, which they have so recently reaffirmed, to have their cases heard by elected officials who are accountable to the people. To make matters worse, not only have the people lost a means of direct accountability, they have lost both

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<sup>11</sup>We would face a different situation if the use of senior judges were only by consent.

means of accountability currently offered as options in the constitution: merit selection or election.

Senior judges do not have to be selected on a merit selection basis after submission of their names to a nominating committee for investigation and recommendation prior to appointment. They have no limited terms. They do not have to stand for election at the end of their terms.

It is not reasonable to conclude that the will of the voters in adopting the revised constitution was to elevate the power of temporary appointment in Article V, Section 2(b) above both options proposed by Revision 7. In Spector, supra, the Court considered the purpose of the constitutional provision for a nominating commission to assist in exercise of the appointive power and concluded that that process was a restraint upon the Governor's power, "not a new process for removing from the people their traditional right to elect their judges ...." Spector, supra, 305 So.2d at 783.

So, too, the constitutional power to appoint senior judges temporarily should not be construed as a "new process for removing from the people their traditional right to elect their judges." Yet that is exactly what the perpetual trial docket for complex cases, staffed solely by non-elected senior judges accomplishes.

It is even less reasonable to conclude that the will of the voters was to

subject complex cases to nonaccountable nonelected judges. To the contrary, to conclude that the senior judges docket may encroach upon the suffrage rights of litigants in complex cases would create a violation of federal equal protection and due process rights. The United States Supreme Court states:

Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Reynolds v. Sims, 377 U.S. 553, 562 (1964). Litigants in complex cases, or in cases whose trials may take eleven days rather than ten, cannot be singled out for different treatment with respect to who will preside over their judicial proceedings. Cf., In re. Apportionment, supra, 414 So.2d at 1053 (right to vote for official who represents you and for each vote to count substantially the same and for official to be elected by persons he represents and not by other persons is constitutionally protected).

The only conclusion that is reasonable is that the senior judges docket violates Petitioners' and other litigants' suffrage rights as well as their rights of due process and equal protection.

**iii. Constitutional infirmity of the orders and practices accomplished by misapplication of Supreme Court's procedures and priorities:**

In implementing the appointive power given the office of the chief justice,

this Court's 1991 Memorandum appears to incorporate and require both a "necessity" and an "emergency" of need for a temporary appointment before a chief judge of a circuit court may exercise the delegated power of appointment.

At the outset, a transferring judge must first attempt to obtain the services of an active elected judge -whether circuit level or county level. In the instant case, there was no attempt to secure an elected judge first. To the contrary, "complex" cases including medical malpractice cases and cases that may require more than ten days to try are **routinely transferred** to the non-elected, senior judges docket.

In addition, the Memorandum catalogues types of "emergency" by priority. The nature of the "emergency" is self-evident in most of the categories. When one of the listed categories occurs, the assignment made under that category is to be reported. This Court annually collects and compiles the number of "judge days" for which appointments were made, by their justifications.

Reference to those compilations, though, reveals that the appointments in the Seventeenth Judicial Circuit do not correspond to the stated categories. The most frequent reason given for appointment is to relieve backlog, a category that is not contained in this Court's Memorandum or Policies and Procedures. The second most frequent reason is the relatively low-ranking category for long civil cases of long duration. This category, category 11, is thus problematic in the Seventeenth Judicial

Circuit.

Category 11 is described as civil cases of “long duration” that will “otherwise disrupt civil calendars.” Petitioner submits that the word “long” and the qualification that the case must “otherwise disrupt civil calendars” are being unreasonably interpreted to render them applicable to ordinary and routine cases. Application of “long” and “otherwise disrupt civil calendars” to ordinary and routine cases removes the justification of “emergency of the public business” from appointments made under that category.

The fact that the case must be so long that it disrupts civil calendars suggests that the anticipated length of trial is extraordinary, not ordinary. Few members of the bench or bar would consider that a case that might consume one trial docket is extraordinary. To the contrary, the sheer number of cases referred to the senior judges docket demonstrates that two-week trials are routine in the Seventeenth Circuit. This Court’s compilations also demonstrate the routine nature of the use of senior judges for routine and ordinary cases: the Seventeenth Circuit used 5,467.50 “senior judge hours” in 1998, or 684 eight-hour days. App.233-256 at 256. This approximates the capacity of two and one-half permanent elected judgeships.

Moreover, the instant case does not threaten to “otherwise disrupt civil calendars.” At worst, it might reduce the total number of cases that will be tried within

the original division's traditional four-week trial docket, but consumption of the case's own assigned trial docket cannot be construed to constitute "disruption," else any combination of cases could be said to have the same effect.<sup>12</sup>

Instead, to comply with the emergency, necessity and reasonability of an incursion into the constitutional right to elect judges, a "long duration" case must be one that does something more than occupy and consume its own assigned docket. Considering the use of the plural "calendars", it appears that the long duration trial must intrude upon and disrupt **other** calendars and dockets, not its own. In other words, the totality of the impact of the case on the remainder of a judge's caseload and calendar must be assessed and must rise to the level of emergency and necessity.<sup>13</sup>

Finally, the practices of the Seventeenth Circuit fail to give appropriate weight to this Court's caution against the use of retired judges for complex cases. This Court's caution supports Petitioners' interpretation that priority 11 should not apply to classes of cases like medical malpractice cases. Complex cases involve many pretrial issues for which a working knowledge of current rules and case developments

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<sup>12</sup>The presence of two two-week trials on the same docket would consume the trial docket. So would four one-week trials.

<sup>13</sup>For example, the tobacco class action threatened to intrude upon and disrupt **every** motion calendar and **every** trial docket for **every other** case assigned to the division. In any event, it was presided over by an **elected** judge .

are particularly necessary. Elective approval of a sitting judge rests, at least in part, upon the public's recognition of his competence and knowledge.<sup>14</sup> Sitting elected judges attend judicial college; fulfill judicial continuing education requirements; and participate in the Conference of Circuit Judges. Fla. Stat. § 26.55(2) (2000)(requiring active, but not retired, judges to participate).

Complex cases also require greater case management. The financial support for elected judges consists of more than their salaries. It includes additional resources for case management that retired judges serving temporarily lack: law clerks, judicial assistants, secretarial staff; sets of reporters and statute books; assigned chambers, phones, and equipment. Voters who elect judges have the right to receive the full benefit of the election, including the financial benefit of full funding. The resources provided by full funding are particularly necessary in complex cases which require so much more judicial attention and involvement.

In complex cases, pretrial issues presented in motions and hearings before the presiding judge create a context in which claims and evidence will be presented at trial. Pre-trial rulings may be only preliminary and may be subject to the

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<sup>14</sup>A judge's knowledge is so important that it has been linked to federal due process rights of criminal defendants facing imprisonment. See, generally, Treiman v. State, 343 So. 2d 819, 822-823 (Fla. 1977)(discussing whether nonlawyer judge can afford due process to person charged with crime punishable by imprisonment).

developments of discovery or may be expected to be revisited at or shortly before trial. Assignment of retired judges to such cases greatly reduces the presiding trial judge's knowledge of the issues, parties, and claims. It thus deprives the litigants of the context that they have developed through pretrial procedures. It further discourages the revisiting of issues at trial for successor judges are more reluctant to change a preliminary ruling of a predecessor judge.

In sum, it is not necessary to determine in advance what other cases would meet the level of exigency implicit in the wording of category 11 and required under Spector. It is only necessary to recognize that the instant case is not extraordinary, does not threaten to disrupt other calendars, and was reassigned simply and routinely as part of an ongoing policy and practice for managing total case-load. Moreover, the instant case is a complex case. The assigned elected judges are current in continuing education and familiar with current rules and case-developments. They have the resources for case management. They have presided over the course of discovery and have the context for the anticipated bounds of issues, evidence, jury charges, and verdict forms to be presented at trial. Accordingly, the originally assigned elected judge should preside over the trial of this cause.

**C. The appointment and practices of the Seventeenth Circuit violate the restriction of appointments to “retired” judges:**

Related provisions of the constitution will be construed in pari materia. Dep't of Env'tl. Prot. v. Millender, 666 So. 2d 882, 886 (Fla. 1996). Provisions of the constitution will be given effect according to the plain and ordinary meaning of its language. Advisory Opinion to the Governor, 706 So. 2d 278, 282 (Fla. 1997)(“natural and popular meaning” as “usually understood by the people”); Shriners Hosp. for Crippled Children v. Zrillic, 563 So. 2d 64 (Fla. 1990); Advisory Opinion to Governor, 22 So. 2d 398,399 (Fla. 1945)(“what the people must have understood”). Finally, construction of a provision of a former constitution applies to a new constitution that contains the same wording. Swartz v. State, 316 So. 2d 618 (Fla. 1975); In re Advisory Opinion to the Governor, 112 So. 2d 843 (Fla. 1959); Gray v. Bryant, 125 So. 2d 846 (Fla. 1960).

Article V, Section 2(b) authorizes this Court to make temporary assignments of “retired” judges. Article V, Section 8 states “No justice or judge shall serve after attaining the age of seventy years except upon temporary assignment or to complete a term ....” Both sections thus relate to “temporary” service by assignment. Both must be read together, and by reference to their ordinary terms and meanings.

Section 8's prohibition of service as a judge after the age of seventy is a mandatory “retirement” provision. “Retired” is an ordinary word meaning is that a person has reached the end of occupational life and has ceased to work. Section 10's

power to appoint must thus be read to refer to persons who have reached retirement.

This Court construed the prior constitutional provision for appointment of retired judges in exactly this manner. In re Rules Governing Assignment to Duty of Retired Justices & Judges, 239 So. 2d 254 (Fla. 1970). Prior Article V, Section 2 provided:

The chief justice of the supreme court is vested with ... authority to temporarily assign justices of the supreme court to district courts of appeal and circuit courts, judges of district courts of appeal and circuit judges to the supreme court, district courts of appeal and circuit courts, and judges of other courts, except municipal courts, to judicial service in any court of the same or lesser jurisdiction. Any retired justice or judge may, with his consent, be likewise assigned to judicial service.

The Supreme Court considered the question whether its power of appointment extended to courts below the circuit level. In answering in the affirmative, this Court ruled that:

[F]ormer active judges of all courts below the level of circuit judges who have retired pursuant to the laws of Florida providing retirement compensation and who are receiving compensation thereunder, are retired judges within the contemplation of Section 2, Article V of the State Constitution.

239 So.2d 254.

The word “retired” in the Florida Constitution has thus been judicially

construed to mean judges who have become eligible for retirement benefits under the state retirement system.

Section 123.04(1), Fla.Stat., provides that retirement benefits for judges are generally available when a judge has: reached the age of sixty and has performed at least ten years of creditable service; or, who was serving as a justice or judge in 1955 and thereafter performed twenty years of service, without regard to age. See, also, Fla. Stat. §§ 25.101, 25.112 (2000).

Restricting appointments to persons who have retired diminishes intrusion upon the right of suffrage. Judges who have performed the required years of service have withstood the challenge of election and reelection. They have a demonstrated history of support by their electors.

By contrast, persons who have not retired but who have resigned or chosen not to run for election or reelection lack the repeated imprimatur of voter approval. A person, for example, who served as judge by executive appointment and decided not to run for election has **never** been given approval by a constituency. Similarly, judges elected for a single term who chose not to run for reelection may well do so because circumstances reveal a lack of community support or constituent approval. Accordingly, only judges who have retired as the constitution requires should be permitted to serve by temporary appointment.

**D. The appointments violate Constitutional requirements for eligibility:**

Article V, Section 8 (1985) describes the qualifications for the office of judge:

No person shall be eligible for office of justice or judge of any court unless he is an elector of the state and resides in the territorial jurisdiction of his court. No justice or judge shall serve after attaining the age of seventy years except upon temporary assignment or to complete a term, one-half of which he has served. ... No person is eligible for the office of circuit judge unless he is, and has been for the preceding five years, a member of the bar of Florida.

The courts have no power to change the qualifications for office set forth in the constitution. Cf., Askew v. Thomas, 293 So. 2d 40 (Fla. 1974) (rejecting the imposition of additional qualifications). This Court has repeatedly relied upon this section as delineating the “qualifications” required for temporary service by Article V, Section 2(b). Brown v. State, 526 So. 2d 903, 905 n.8 (Fla. 1988); Treadwell v. Hall, 274 So. 2d 537, 538 (Fla. 1973).

In Card v. State, 497 So. 2d 1169 (Fla. 1986), this Court addressed a challenge to the authority of a presiding judge who had granted a change of venue but who had not sought a temporary appointment for service in the new venue. After a conviction by the jury, the case was returned to the original circuit and a death sentence imposed by the trial judge. The defendant contended that the lack of

appointment rendered the judge's acts void. This Court ruled that the judge had served as a de facto judge and that his actions were merely voidable. The decision of the Court presumed that a circuit judge could be assigned out of circuit by this Court pursuant to the change of venue. This Court did not directly address the issue whether an out-of-area assignment was otherwise permissible under the qualifications and eligibility requirements of the constitution. Petitioners suggest the point is unresolved.

Judges of the Polk County Court v. Ernst, 615 So. 2d 276 (Fla. 2d DCA 1993) has relied upon Card to support the appointment of a county court judge to a circuit position in a different county within the same circuit. However, Petitioner submits that neither case is good authority for application of the current version of Article V, Section 2(b).

The 1956 version of Article V, Section 2(b) provided that the Chief Justice could appoint district and circuit court judges to any other district, circuit, or supreme court. See text page 31, supra. This section did not refer to qualifications and did not define eligibility beyond the fact that the assigned persons were judges. Art. V, Section 13, Fla. Const., at the time did not include a residency requirement. The language of Section 2(b) thus specifically authorized an appointment of a judge to a jurisdiction in which he did not reside.

Now, however, the express authority to appoint to all jurisdictions has

been deleted. Absent specific authorization for out-of-jurisdiction appointments, there is no longer constitutional authority to deviate from the clear terms of the residency requirement contained in Article V, Section 8.

The list of senior judges in the Seventeenth Circuit contains several persons who do not reside in Broward County. See, App.10-33 at 15. The residence requirement of Article V, Section 8 protects the interests of the voters by guaranteeing that only persons accountable to the electorate and acquainted with the area's interests will be presiding over the county's judicial concerns. Accordingly, a writ of prohibition should issue to prevent appointment of any residents of counties other than Broward County to service as senior judges.

### **CONCLUSION**

A writ of prohibition should issue to prevent the further exercise of the judicial office by senior judges over this case and to prevent future transfers of cases to the "senior judges docket" in violation of the Constitutional provisions limiting the courts' powers of appointment. Further, a writ of prohibition, or directive under the all-writs power, should issue to prevent senior judge service by persons who are not retired and are not residents of Broward County.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of

Prohibition was served by mail this 13<sup>th</sup> day of September, 2001, on: **David Krathen, Esq.**, The Law Offices of Krathen, Freedland & Roberts, 2665 Executive Park Drive, Suite 3, Weston, FL 33331; **Michael J. Rotundo, Esq.**, Bunnell, Wolfe, et al., 888 East Las Olas Boulevard, Suite 400, Fort Lauderdale, FL 33301; Kevin O'Connor, Esq., O'Connor, Chimpoulis, Restani, Marreo & McAllister, P.A. 2801 Ponce de Leon Boulevard, Suite 900 Miami, FL 33134; **Mark Morrow, Esq.**, Morrow & Milberg, P.A., P. O. Box 15698, Plantation, FL 33318-5698; **F. Bryant Blevins, Esq.**, Marlow, Connell, Valerius, Abrams, Adler & Newman, 2950 S. W. 27<sup>th</sup> Avenue, Suite 200,

Miami, FL 33133; and Chief Judge Dale Ross, Broward County Courthouse, 201 S.E.  
Sixth Street, Fort Lauderdale, FL 33301 on this 14th day of January, 2002.

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