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TY W. BERDEAUX
MARSHAL

DISTRICT COURT OF APPEAL
FIFTH DISTRICT
300 SOUTH BEACH STREET
DAYTONA BEACH, FLORIDA 32114
(386) 947-1500 COURT
(386) 255-8600 CLERK

April 2, 2009

The Honorable Jay White
President, The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

via email: jwhite@richmangreer.com

Dear Mr. White:

At an emergency meeting of the judges of the District Court of Appeal for the Fifth District, State of Florida, earlier today, the judges of the court unanimously voted to ask The Florida Bar to intervene in ongoing proceedings before The Florida Supreme Court regarding the failure of the governor to exercise his constitutional responsibility to fill a vacancy on this court.

On September 2, 2008, the Honorable Robert J. Pleus, Jr., sent a letter to the governor informing him that he would retire on January 5, 2009, as District Judge of the Fifth District Court of Appeal. In correspondence dated September 8, 2008, the governor acknowledged Judge Pleus's correspondence and stated that he "appreciate[d] the importance of minimizing disruption to the courts' administration by making timely judicial appointments"

Thereafter, the Judicial Nomination Commission for the Fifth District Court of Appeal, a majority of which were appointed by Governor Crist, advertised the vacancy, received 26 applications, investigated the qualifications of the candidates, interviewed the candidates, and, pursuant to its constitutional mandate, nominated six highly qualified men and women for the appointment. The list of six names was transmitted to the governor on November 6, 2008, triggering the commencement of the 60-day window within which the governor was required to fill the vacancy pursuant to Article 5, section 11 of the Florida Constitution.

In correspondence dated December 1, 2008, the governor purported to reject the list of nominees because it did not include one or more African-Americans. The

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governor asked the Nominating Commission to reconvene and provide a new list of nominees as soon as possible.

The Nominating Commission responded on December 4, 2008, stating that it had thoroughly investigated each of the 26 applications and nominated the most qualified individuals taking into consideration, among other things "racial, ethnic, and gender diversity, as well as geographic distribution of the population." The commission also emphasized that it had nominated the maximum number of nominees permitted by the Florida Constitution.

When the January 5, 2009 deadline came and went with no action by the Governor, we communicated by letter and telephone with the Governor's office to ascertain his intentions. We were also made aware of additional correspondence between the Governor and the Fifth District Court of Appeal Judicial Nominating Commission regarding the governor's expressed displeasure that none of the African-American applicants were nominated by the commission. Apart from this correspondence, neither the Governor nor his staff has offered any reason or justification for failing to fill this vacancy. We were simply told that the Governor needed more time. A letter of January 21, 2009 transmitted to the Governor by the Fifth District Court of Appeal Judicial Nominating Commission explained that the constitutional framework by which vacancies are to be filled did not permit the Governor to reject the nominees or to refuse to select a nominee. The commission indicated that it would welcome any legal authority to the contrary which the Governor's office was aware of, but none was provided.

Up until this writing, the governor has failed to fill the vacancy, failed to interview the candidates and failed to provide any legal justification for his failure to comply with the clear mandate of Article 5, section 11, which provides, in pertinent part, that "the governor shall make the appointment within 60 days after the nominations had been certified to the governor."

As a result, the court's ability to adequately serve its constituency of over three million people throughout the 13-county region comprising its jurisdiction has been disrupted in that the court is functioning with only nine of the ten judges certified by the Supreme Court and approved by the legislature to manage its caseload and meet its deadlines.

In addition to the direct impact on this individual court, more importantly, the governor's actions in ignoring his clear constitutional mandate have served to undermine the integrity of the nominating process. As you are no doubt aware, judicial nominating commissions were approved by the voters of the State of Florida and included in the constitution of the State of Florida for the specific purpose of serving as a check and balance on the otherwise unbridled discretion of the governor to appoint judges. Although the members of the Nominating Commission are appointed by the governor, they are intended to act as an independent board with the responsibility to

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thoroughly screen applicants and provide a slate of the most qualified applicants from which the governor must fill a particular vacancy. If the governor is successful in his attempt to refuse to fill a vacancy because he is unhappy with the proffered nominees, then this constitutional limit on gubernatorial authority, mandated by the people, will be completely thwarted.

Mr. White, the governor is now almost 90 days overdue in filling this vacancy on our court. Although the court has taken every reasonable step to emphasize to the governor how this delinquency affects the court's ability to carry out its function, to date, the governor has neither made the appointment nor communicated with the court when or if an appointment will be made. Although the judges of the court are constitutionally charged with the responsibility to "support, protect and defend" the constitution of the State of Florida, they believe that it is preferable to seek the assistance of the Bar in vindicating these important constitutional provisions, rather than directly participate in litigation.

Therefore, we ask that you present this issue to the Board of Governors or Executive Committee of The Florida Bar and that it forthwith intervene in the pending proceeding wherein Robert J. Pleus, Jr., is petitioner and the Honorable Charles J. Crist, Jr., Governor, is respondent.

We would also request that the Bar undertake a concerted effort to educate the public as to the structure and history of the judicial nominating system and the detrimental effects on this system caused by the Governor's inaction.

Sincerely yours,



William D. Palmer
Chief Judge

WDP/mgv