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IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

REX E. RUSSO,

Petitioner,

vs.

**MARY CAY BLANKS,
CLERK OF THE THIRD DISTRICT
COURT OF APPEAL, IN AND FOR
THE STATE OF FLORIDA,**

Respondent.

PETITION FOR WRIT OF MANDAMUS

REX E. RUSSO, ESQ.
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COMES NOW the Petitioner, in proper person, and as a licensed member of the Florida Bar (hereafter "counsel"), and files this Petition for a Writ of Mandamus, directed to Respondent, Mary Cay Blanks, Clerk of the Third District Court of Appeal, in and for the State of Florida (hereafter "clerk"), and as grounds therefor states:

STATEMENT OF JURISDICTIONAL BASIS

This court has jurisdiction pursuant to Article V, §3(b)(8) of the Florida Constitution.

STATEMENT OF THE FACTS

> [Counsel's reference to the Appendix filed herewith shall be to "Ax" as an abbreviation for "Appendix" and then followed by the page number assigned within the Appendix. Page numbers assigned within the Appendix appear in red type in the lower right hand corner of each page.]

On September 26, 2017 counsel sent the clerk a request for information under Florida's Freedom of Information Act, and under Article I, Section 24 of the Florida Constitution, seeking production of documents maintained by the clerk's office [Ax 3]. The clerk deemed the request one for judicial branch public records pursuant to Article I, Section 24 of the Florida Constitution, and Rule 2.420 of the Florida Rules of Judicial Administration [Ax 6]. Only a copy of the requested Internal Operating Procedures utilized by the Third District Court of Appeal [Ax 8] was produced. All of the other specifically requested documents were asserted to be confidential and exempt [Ax 6–7].

NATURE OF RELIEF SOUGHT

Counsel seeks a writ of mandamus compelling the clerk to fully comply with counsel's request for documents in accordance with Article I, section 24, of the Florida Constitution which, as implemented by Florida Rule of Judicial Administration 2.420, requires the clerk to avoid overly broad and unnecessary assertions of confidentiality. A petition for writ of mandamus is the appropriate action for seeking enforcement of this constitutional right. *Gannett Co. v. Goldtrap*, 302 So. 2d 174 (Fla. 2d DCA 1974). Petitions for writ of mandamus, unlike plenary appeals, and petitions for discretionary review, are neither subject to a 30-day rule within which the petition must be filed nor any other statute of limitations. *Van Meter v. Singletary*, 682 So. 2d 1162 (Fla. 1st DCA 1996) (*rev'd on other grounds*, 708 So. 2d 266).[1]

ARGUMENT IN SUPPORT OF THE PETITION

Florida residents have long believed that one of the safeguards for assuring the independence, impartiality, and fairness of the judiciary sitting in judgment of their cases has been the blind assignment of cases by the office of the clerk of the courts.

[1] Counsel delayed filing this petition because proceedings were on-going before the district court in an action related to one of the cases for which documents were requested (i.e. 3D17-1254; related to 3D17-0001), and counsel thought it more appropriate to await the outcome thereof before proceeding with this petition.

Considering some past history of Florida's appellate courts, a completely random assignment of cases to a district court panel is of great importance to the public as it advances a meaningful assurance of impartiality. In most circumstances, the district level appeal is an individual's last resort to justice. If integrity is lost at the appellate level, then the entire judicial system becomes suspect of unchecked improprieties. In accord with those steadfast principals and beliefs, Florida's residents enjoy the right to open disclosure of information concerning the conduct of their government, including the judicial branch, with the exception of narrow and defined exclusions.

Despite the public perception, there is no constitutional nor statutory requisite that the clerks of the district courts blindly assign cases to a panel. Likewise, the Florida Rules of Judicial Administration are devoid of any such requirement. Even though the Internal Operating Procedures of the Third District [Ax 25] (hereafter IOPs") prescribe that the clerk of the court is to randomly assign cases to a panel, and randomly choose the primary judge responsible to write the opinion, those IOPs do not actually assure random assignment. In fact, the IOPs later state that the clerk's duty is to assign cases ready for oral argument to "an appropriate panel" and an appropriate primary judge [Ax 37] with no reference therein to the concept of random assignment. Furthermore, neither "an appropriate panel" nor "appropriate primary judge" is defined. Vague inconsistencies within the IOPs, as well as clearly stated rules within the IOPs, provide opportunities for a judge to make their way onto a panel by design.

As stated in the IOPs, the clerk serves at the court's pleasure [Ax 19, Ax 24]. So, apparently the chief judge, or the chief judge's designee, could assign judges to sit on a particular panel. Included among the responsibilities and authority of the chief judge, which point to such ability in the IOPs, are: "coordinating scheduling of panels for oral argument calendars" [Ax 22, at paragraph (5)] (which duty is otherwise undefined); the power to change judges assigned to the panel [Ax 25]; and, "if oral argument is to be heard," the case is first "screened by the chief judge" [Ax 26]. No law prevents an appellate judge from requesting that the chief judge assign them to a particular case, nor is there any law preventing the chief judge from making such an assignment.

A judge desiring to hear a particular case can finagle their way on to the panel other than through an assignment by the chief judge. According to the IOPs, "[a]ny judge may exchange ... with any other judge" by merely giving written notice of the exchange [Ax 25]. Also, the head of the panel could be approached by a judge requesting to sit on a panel, or the head of the panel could initiate a change of those assigned to the panel [Ax 25]. Regardless, even if the IOPs commanded blind assignment in every instance, including blind assignment of any substituted judge[2], violation of the IOPs would not *per se* give rise to a private enforceable right. See,

[2] Compare the Third District's IOPs with those of the Supreme Court which provides for blind assignment to panels, including blind assignment of any substitute judge.

Murthy v. Sinha Corp., 644 So. 2d 983 (1994) (private cause of action requires a statute giving rise to a civil liability as opposed to protecting public safety or welfare— the IOPs are neither a statute nor give rise to a private right).

In the absence of any statutory requisite for random assignment, assurance of the integrity in the methodology for panel assignments rests with the public invoking their constitutional right to access of information, and individual litigants demanding their constitutional rights to due process. Due process "clearly requires a fair trial in a fair tribunal." *Bracy v. Gramley*, 117 S. Ct. 1793, 1797 (1997). Transparency of the methodology is essential to ensuring the integrity of the appellate process especially since no independent oversight is in place to prevent judges from manipulating the composition of the panel.

Paramount to the public's right of access to information maintained by the judicial branch is Article I, section 24 of the Florida Constitution which states at subsection (a) thereof:

> *Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government. . . . .*

Neither Article I, section 24, nor any other provision within the Florida Constitution exempts compliance with the public right stated at subsection (a). The

only matter specifically made confidential by the Florida Constitution pertains to individual rights of privacy commencing with Article I, section 23, which states:

> *Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.*

The remaining privacy provisions are more specific such as a minor's right to privacy as guaranteed by Article X, section 22, and a patient's right to privacy as guaranteed by Article X, section 25.

Relying on Article V, section 2 of the Florida Constitution, the court instituted Rule 2.420 of the Florida Rules of Judicial Procedure ("the rule"). While the rule lacks specific constitutional authority for the creation of restrictions on the right to public records, and emanates from a very general power of the court to enact rules governing "practice and procedure" before the court, it does generally mirror the constitutionally protected right of access to public records. However, the rule must necessarily be deemed a means by which the constitutional right to access is implemented, as limited by the constitutional right of privacy and such other exemptions as may be statutorily created. A rule of court may not create new exemptions which are substantive law because doing so would unconstitutionally impinge upon the legislative branch. *Fla. Const., Art. II, sec. 3. Massey v. David,* 979 So. 2d 931, 936 (Fla. 2008) ("the Legislature is empowered to enact substantive

law while this Court has the authority to enact procedural law"). Creation of new exemptions to the right to access public records was specifically reserved to the legislature. *Fla. Const., Art. I, sec. 4(c).*

In denying counselor's full request for records, the clerk relied upon a decision of this court in *Times Publishing Company v. Ake,* 660 So. 2d 255 (Fla. 1995). In *Ake* this court held that the courts are not an "agency of government" but rather a part of an equal and independent branch of government. Accordingly, this court held that the judicial branch of government is not subject to Florida's Freedom of Information Act, Florida Statutes §119.01 *et seq.*, and could not be held accountable for attorney's fees resulting from any alleged violation of the Act ("the Act").

Oddly, the only provision that provides additional constitutionally authorized exemptions to the right of access to public documents, including records of the judicial branch, is the Act. Not surprisingly, the rule appears to adopt many of the exemptions as found in the Act. So, while this court in *Ake* was correct that it is not an "agency" of government, the court must still abide by the constitutionally imposed limitations as to what is exempt from public access, including those exemptions the court selectively adopted from the Act.

While the clerk's response [Ax 6] clearly addressed counsel's first request [Ax 3], and purportedly addressed the second and third request, an exemption pursuant to Florida Rule of Judicial Administration 2.420(c)(1) was raised as to the remaining,

very specific requests, concerning two separate cases before the district court.[3] However, the exemption stated at Rule 2.420(c)(1) neither mirrors the exemptions stated in the Constitution nor in the Act, but rather appears for the most part to be the necessary product of a super species of common law that transcends the constitution. Regardless, counsel's very specific requests were not of the type addressed by Rule 2.420(c)(1) which states:

> *The following records of the judicial branch shall be confidential: (1) Trial and appellate court memoranda, drafts of opinions and orders, court conference records, notes, and other written materials of a similar nature prepared by judges or court staff acting on behalf of or at the direction of the court as part of the court's judicial decision - making process utilized in disposing of cases and controversies before Florida courts unless filed as a part of the court record;*
>
> Petitioner's very specifically stated unfulfilled requests were for [Ax 3–5]:

- All administrative orders, directives, memorandum, notes, letters, or communiques of any sort establishing a panel for Case No. 3D15-1437.
- All administrative orders, directives, memorandum, notes, letters, or communiques of any sort establishing a panel for Case No. 3D15-2330.
- All administrative orders, directives, memorandum, notes, letters, or communiques of any sort regarding any changes to the panel for Case No. 3D15-1437.
- All administrative orders, directives, memorandum, notes, letters, or communiques of any sort regarding the order consolidating Case No. 3D15-2330 into Case No. 3D15-1437, and resetting the date for oral argument.

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[3] Both cases actually entail two separate appellate case filings each. In the earlier cases, the two were consolidated. In the later case 3D17-0001, there was no consolidation with related case 3D17-1254.

- All memorandum, notes, letters, or communiques of any sort regarding the dissemination of information as to the composition of the panel for Case No. 3D15-1437.

- All memorandum, notes, letters, or communiques of any sort regarding the dissemination of information as to the composition of the panel for Case No. 3D15-2330

- All memorandum, notes, letters, or communiques of any sort regarding the dissemination of information as to any changes in the composition of the panel for Case No. 3D15-1437.

- All administrative orders, directives, memorandum, notes, letters, or communiques of any sort establishing a panel for Case No. 3D17-0001.

- All administrative orders, directives, memorandum, notes, letters, or communiques of any sort regarding any changes to the panel for Case No. 3D17-0001.

- All administrative orders, directives, memorandum, notes, letters, or communiques of any sort regarding the order in Case No. 3D17-0001 resetting the date for oral argument.

- All memorandum, notes, letters, or communiques of any sort regarding the dissemination of information as to the composition of the originally assigned panel for Case No. 3D17-0001.

- All memorandum, notes, letters, or communiques of any sort regarding the dissemination of information as to any changes in the composition of the panel for Case No. 3D17-0001.

CONCLUSION

The clerk's refusal to tender the records does not advance any legitimate interest of the court or state. Even if the clerk invoked an IOP exemption that was specifically applicable, such an exemption would not be the sort that survives

Florida's very limited exemptions to the public's constitutional right to disclosure. Necessary application of an extra-constitutional exemption must be applied in the narrowest of manners. Asking for the disclosure of information as to how a panel that has already reached an opinion was comprised (as in this case) is very different from asking who will be on a future panel (which merits protection[4]). If any of the requested documents contain actual references to a judge's thoughts or beliefs relevant to how the opinion was reached, then the clerk may redact those references and raise very specific claims of exemption relevant to those redactions for possible further contest. "To the extent reasonably practicable, restriction of access to confidential information shall be implemented in a manner that does not restrict access to any portion of the record that is not confidential." *Fla. R. Jud. Admin. 2.420(b)(4).*

WHEREFORE, the petition must be granted and the Clerk of the Third District Court mandated by writ to comply with the petitioner's constitutional right to receive public documents.

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[4] Yet, the IOPs call for the clerk to publically disclose the panel members for a case "no later than six days prior to the Monday of ... cases to be heard...[Ax 26]." Any disclosure of the panel members prior to the morning of oral argument is nothing less than encouragement to those who would dare meddle in the sanctity of the judicial system — and who perhaps had no thought to meddle prior to learning of the assigned panel members.

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I HEREBY CERTIFY, pursuant to Rule 9.210(a)(2), that the preceding computer generated brief has been prepared in Times New Roman 14-point font.

CERTIFICATE OF SERVICE AND SIGNATURE OF COUNSEL

I HEREBY CERTIFY that a true and correct copy of the foregoing is being served via email to Respondent - Clerk of the Third District Court in and for the State of Florida, by service on the Clerk of the Court, Mary Cay Blanks via email at BlanksM@flcourts.org on this day - January 11, 2018.

/s/

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