IN THE THIRD DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA

CASE NO. 3D18-0419

REX E. RUSSO,

Petitioner,

vs.

MARY KAY BLANKS, as the
Clerk of the Third District Court,

Respondent,

_____/

PETITIONER'S RESPONSE TO COURT'S ORDER TO SHOW CAUSE

COMES NOW the Petitioner in response to this Court's *ex parte*, apparently self-initiated, Order to Show Cause why the Petition for Writ of Mandamus as against the Clerk of this Court ought not be dismissed as premature, and as grounds therefor states:

[DEFINITIONS USED HEREIN]

- "[Ax ??] refers to the Appendix filed with the Petition followed by the page number therein.
- "Chief Judge" refers to the Chief Judge of the Third District Court.
- "Clerk" or "Clerk of the Court" with initial capitals refers to the Clerk of the Third District Court.
- "Constitution" refers to The Constitution of the State Florida.
- "Court" with the first letter capitalized refers to the Third District Court.
- "Legislature" refers to the Florida legislature.
- "Rule(s)" refers to the Rules of Judicial Administration and particular Rule cited thereafter.

- "Supreme Court" refers to the Florida Supreme Court.
- "3D IOPs" refers to this Court's Internal Operating Procedures.
- "SC IOPs" refers to the Supreme Court's Internal Operating Procedures.

(Other uses of the above terms shall be qualified in context.)

BY LAW – THE CLERK OF THE COURT IS THE CUSTODIAN

Petitioner did not make his request for "administrative records" as the Court may be defining such reference. Petitioner made his request for "public records" pursuant to his right under the constitution which provides the following:

> ARTICLE I, Section 24. Access to public records and meetings.—
> (a) **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 and each agency or department created thereunder**; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The constitution only empowers the legislature with the right to "enact laws governing the enforcement of [Article I, Section 24], including the **maintenance, control**, destruction, disposal, and disposition of records made public by this section" [bracketed words substituted for clarity] [bold emphasis added]. *Art. I, Sec. 24(c), Fla. Const.* Furthermore, only the legislature has constitutional authority to create an "exemption of records from the requirements of subsection (a)." *Art. I, Sec. 24(c), Fla. Const.* No similar powers are granted by the constitution to the courts.

In accordance with its power under the constitution, the legislature made the Clerk of the Court the custodian of the records sought by Petitioner. Florida Statute §35.24 states that "**[a]ll** books, papers, records, files and the seal of each district court of appeal shall be kept in the office of the clerk of said court" [bold emphasis added]. Following the law, Petitioner made his request upon the proper custodian, that being the Clerk, pursuant to Article I, Section 24(c) of the Florida Constitution, and pursuant to Florida Statutes §35.24.

Writing on behalf of "the Court," the Clerk questionably asserted that "the judicial branch is not governed by Chapter 119" [Ax 6] and cited to *Times Publishing Company v. Ake*, 660 So. 2d 255 (Fla. 1995). *Ake* did not address any issue of exemption or confidentiality; the sole issue there was the attorney fee provision within §119.12 of the Florida Statutes. More importantly, Times Publishing made its request for records from Ake, as clerk of the court for Hillsborough County, in March of 1992 (*Ake* at 255) before the constitutional amendment adding Article I, Section 24 was approved by voters on November 3, 1992, and well before the amendment went into effect on July 1, 1993. Since that amendment, the courts of this state and the clerks serving the courts have been constitutionally subjected to public records review to the same extent as any other branch of government. Whether the Petitioner's request is now deemed to have been one made pursuant to Chapter 119 or pursuant to the Florida Rules of Judicial Administration is largely irrelevant because the legislature, pursuant to their sole authority to enact exemptions under the constitution, has not granted any exemption to the Clerk of the Court, nor to the Chief Judge, nor to the Court.

THE RECORDS REQUESTED ARE NOT "ADMINISTRATIVE RECORDS"

Petitioner's request was for "public records." In her response letter, the Clerk did not refer to Petitioner's request as one for "administrative records" but instead referred to them as "judicial branch public records." First to assert that the request was for "administrative records," over which the Chief Judge is the custodian, was this Court in the Order to Show Cause. However, the Court, aside from ignoring constitutionally supported Florida Statutes §35.24, did not look closely enough at the definitions within the Florida Rules of Judicial Administration and within its own IOPs. The term "administrative records" is negatively defined in Rule 2.420(b)(1)(B) as **all records other than "court records"** as defined in Rule 2.420(b)(1)(A). But, "judges' assignment records" (i.e. the records Petitioner requested) are considered by this court to be "court records," and by this court's own verbiage do not fall in the catch-all-other definition of "administrative records." *3D IOPs, 6. CLERK* [Ax 17].

As stated in the 2002 Court Commentary to the Rules of Judicial Administration, it was "anticipated that each judicial branch entity" would implement policies and procedures regarding public records requests. Accordingly, this Court implemented its IOPs which provide that "judges' assignment records maintained by the clerk's office" are considered "court records" [Ax 17][1]. *Ejusdem generis* does not allow for any other interpretation; although, the statement is so plain and clear it does not require interpretation. *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1088–89 (Fla. 2005) ("general words are construed as applying to the same kind or

[1] "The clerk shall make **all court records** available for public inspection with the exception of ... judges' assignment records **maintained by the clerk's office**...." [bold emphasis added]. *3D IOPs 6. CLERK*.

class as those that are specifically mentioned"). Furthermore, according to Rule 2.420(b)(3) "the custodian is the official charged with the responsibility of maintaining the office having the care, keeping, and supervision of such records." So, the Clerk of the Court, being the person responsible for maintaining the "judges' assignment records," among other "court records," is and was — by this Court's own definition — the custodian of the records requested.

While this Court's IOP exempts the Clerk from making "judges' assignment records maintained by the clerk's office" available to the public, production of those public records has not been exempted by the legislature as constitutionally required for any such exemption. *Art. I, §24(1)(c), Fla. Const.* Any argument that "the Court" directed the Clerk to withhold those public records out of necessity, to maintain the impartiality of the court, was lost once the opinions in the relevant cases became final. Withholding the records after such time is counter-intuitive to maintenance of this Court's, and the Clerk's, integrity.

EVEN IF THE RECORDS WERE "ADMINISTRATIVE RECORDS," THE "CHIEF JUDGE" PARTICIPATED IN THE PROCESS

Although Petitioner was seeking public records regarding judicial assignments and not an explanation of the Chief Judge's methodology for making panel assignments, the Clerk of the Court extended an invitation from the Chief Judge to meet with Petitioner[2] "to discuss any further questions . . . regarding procedures not expressly provide in the Court's IOP."[3] That leaves no doubt that, in preparation of

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[2] The offer was never accepted.

[3] It is worrisome that there are "procedures not expressly provided in the Court's IOP." If the procedures are in writing, as they should be, then they were within the scope of the records Petitioner requested. As "public records" they should have been among the records maintained by the Clerk. *§35.24, Fla. Stats.*

a response to Petitioner's request, the Chief Judge was involved in the process and it explains why a copy of the Clerk's letter was sent to the Chief Judge [Ax 7].

If in fact judicial assignment records were considered by "the Court" to be "administrative records," then the Clerk must be deemed to have responded as the Chief Judge's designee. *Fla. R. Jud. Admin. 2.420(b)(3).* Furthermore, by directing the Clerk to respond to Petitioner's request, the Chief Judge waived the nebulous service contest argument raised by the Court in the Order to Show Cause. *Thomas v. Bank of New York*, 7 So. 3d 574 (Fla. 1st DCA 2009). If there were merit to this court's Order to Show Cause, then the Clerk should have raised any service contest in her responsive letter, especially after consultation with "the Court" and the Chief Judge. However, the Clerk raised no such objection, nor was the Clerk directed to make such an objection by "the Court" or Chief Judge with whom she consulted, because the Clerk obviously recognized that she is the records custodian, as did "the Court," and as did the Chief Judge.

If the Clerk does not in fact consider herself the custodian, then the Clerk will have an opportunity to make that argument in reply to an order directing her to show cause why the petition for mandamus ought not be granted. However, if the Clerk considers herself the custodian, but does not have possession of the records as was her duty under Florida Statute §35.24, then the Clerk should be compelled to undertake "efforts to determine from other[s] . . . within the agency . . . whether such a record exists and, if so, the location at which the record can be accessed." *§119.07(1)(c), Fla. Stat. (2016).* "Agency" is defined as "any state . . . unit of government created or established by law. . . ." *§119.07(1)(c), Fla. Stat. (2016).* This definition of "agency" is sufficiently broad so as to encompass the Clerk of the

Court, and must be applied to the Clerk following the constitutional amendment that added Article I, Section 24.[4]

"THE COURT," "THE CHIEF JUDGE," AND "THE CLERK OF THE COURT" ARE ALL SYNONYMOUS IN CONTEXT

Since "[q]uestions by non-court personnel regarding the court and its work" are supposed to "be directed to the clerk's office rather than to the office of any judge," this Court's contest to service of Petitioner's public records request upon the Clerk is an odd contest indeed. *3D IOPs 6. CLERK* [Ax 17]. In response to the records request, it was "the Court" (not the "Chief Judge;" not "the Clerk of the Court") that considered Petitioner's "request for information as a request 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].

Use of the term "the Court" sounds like a reference to the judges at large, which makes sense since the IOP restricting the Clerk of the Court from producing "judges' assignment records" was voted upon by "the Court." *3D IOPs 19. Amendments* [Ax 48]. If the Clerk of the Court, who later in her letter refers to the "Chief Judge," was equating "the Court" with "Chief Judge," the reference is equally

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[4] In *Ake*, the Supreme Court mentions that the lower court had found Chapter 119 inapplicable because the clerk of court was not an agency of the state. *Times Publishing Company v. Ake*, 660 So. 2d 255 (Fla. 1995). However, in reaching its opinion the Supreme Court makes no mention of agency finding instead that clerks "are an arm of the judicial branch and are subject to the oversight and control of the Supreme Court of Florida, rather than the legislative branch." *Ake* at 257. That changed after the constitutional amendment went into effect on July 1, 1993, but the Supreme Court had to apply the pre-1992 Constitution to Times Publishing's March of 1992 request for records because the amendment was not made retroactive. *State v. Lavazzoli*, 434 So. 2d 321 (Fla. 1983) (especially where substantive rights change, a constitutional amendment must make clear that retrospective application is intended).

understandable. The Chief Judge is also a member of "the Court." So, to the extent Rule 2.420 would have had a bearing on this action, if the Chief Judge were the records custodian for "the Court" then the Chief Judge must have designated the Clerk to respond on behalf of "the Court." See, *Rule 2.420(b)(3)* ("references to 'custodian' mean the custodian, or the custodian's designee").

PETITIONER IS BEING DENIED DUE PROCESS AND EQUAL RIGHTS

For Petitioner to believe that this Court is acting "fairly and impartially," meaning free of influence other than by the parties pursuant the prescribed course stated in Rule 9.100 of the Florida Rules of Appellate Procedure, the Petitioner would have to believe that neither the Clerk of the Court, nor the Chief Judge, nor any member of "the Court" entered into *ex parte* communications with the Court that nudged the Court into advocating the service contest raised by the Order to Show Cause. Even in the absence of an *ex parte* communication, given that the Clerk of the Court works extremely closely with the Chief Judge, and is subject to having her employment terminated by the Court, Petitioner is unable to fathom how this Court could possibly be impartial. It is an inescapable conclusion that this court does not meet the definition of an impartial tribunal capable of hearing the Petition. Due process "clearly requires a fair trial in a fair tribunal." *Bracy v. Gramley*, 117 S. Ct. 1793, 1797 (1997). The only courts that may afford the Petitioner due process are the Florida Supreme Court and the United States Supreme Court.

In addition to the denial of Petitioner's rights to due process and the folly that led this Court to sit in review of the petition, dismissing the petition would exacerbate an already ugly situation by denying Petitioner his equal rights under the law as guaranteed by both the United States and Florida constitutions. *Art. I, §2, Fla.*

Const.; Amend. XIV, §1, U.S. Const. Many others have made demands for judicial public records from the various clerks of the courts throughout Florida. *Williams v. State*, 163 So. 3d 618 (Fla. 4th DCA 2015); *Blackshear v. State*, 115 So. 3d 1093 (Fla. 1st DCA 2013); *Gilliam v. State*, 996 So. 2d 956 (Fla. 2d DCA 2008); *Minasian v. State*, 967 So. 2d 454 (Fla. 4th DCA 2007); *Tedesco v. State*, 807 So. 2d 804 (Fla. 4th DCA 2002); *T.T. v. State*, 689 So.2d 1209 (Fla. 3d DCA 1997). Yet, there is not one known case where an appellate court of this state determined that a request for "court records" was "premature" because the request should have been addressed to the chief judge instead of the clerk.

The Court's suggestion that Petitioner start anew is wrong and leads nowhere. It is wrong because the Clerk of the Court is the custodian of the public records, not the Chief Judge. It is wrong because there is no reason to expect any change in the overall progression of – a request to the Chief Judge – a denial – a petition to the Supreme Court – and transfer of the petition to this court (so long as Justice Polston maintains his position as the administrative writs justice). It is wrong because in a new action the Chief Judge could properly assert that the Clerk of the Court is the records custodian and cause another dismissal and thus a repeat of the first progression: a request upon the Clerk – a denial – a petition to the Supreme Court – and transfer of the petition to this court. It is wrong because laws change. It is wrong because records are destroyed or potentially lost due to calamities or otherwise. It is wrong because it will lead to unnecessary delay and unnecessary cost to the Petitioner. It is wrong because the Chief Judge's assertion that she is an interested party in the outcome of the petition, as raised on her behalf by this court in the Order to Show Cause, is best met by this court asserting its inherent power and allowing (if

not ordering) the Chief Judge to respond to the petition, along with the Clerk of the Court. *Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, In re*, 561 So. 2d 1130, 1133 (Fla. 1990) ("Every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions."). It is wrong because had Justice Polston (i.e. the administrative writs justice) not improvidently transferred the petition to this court, thus allowing instead a proper progression of the petition before the Supreme Court in accordance with its IOPs, a justice would have been assigned by the Clerk of the Supreme Court to initially review the petition, and if that justice decided to dismiss the petition, the petition would have been seen by a panel of five justices for a final decision (i.e. the initial justice that was assigned and four other justices assigned by the Clerk of the Supreme Court) as opposed to being seen only by the eyes of Justice Polston. Compare, *SC IOPs Section 1, D* with *SC IOPs Section 2, D(1) and D(2).*

CONCLUSION

Dismissing this petition as premature would be another folly. Petitioner has presented the court with a facially sufficient petition for mandamus, leaving this court no reasonable option but to comply with Rule 9.100(h) of the Florida Rules of Appellate Procedure and "issue an order either directing the respondent to show cause, within the time set by the court, why relief should not be granted or directing the respondent to otherwise file, within the time set by the court, a response to the petition." *Minasian v. State*, 967 So. 2d 454 (Fla. 4th DCA 2007)

WHEREFORE, the Court must not dismiss the petition as it was not wrongly served on the Clerk of the Court, nor is the petition premature because the Clerk of this Court is the custodian of the court's public records and the proper respondent thereto.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY, pursuant to Rule 9.100(ℓ), that the preceding computer generated brief has been prepared in Times New Roman 14-point font, and meets the style requirements stated in the rule.

/s/

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CERTIFICATE OF SERVICE

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, Hon. Mary Cay Blanks via email at BlanksM@flcourts.org, and on Michael William Mervine (assistant to the Attorney General, as noticed by the Supreme Court), via email at michael.mervine@myfloridalegal.com , on this day - April 21, 2018.

/s/

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