

IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

REX E. RUSSO,

Petitioner,

vs.

**MARY CAY BLANKS, CLERK
OF THE THIRD DISTRICT COURT OF APPEAL,
and
LESLIE B. ROTHENBERG, CHIEF JUDGE
OF THE THIRD DISTRICT COURT OF APPEAL.**

Respondents.

PETITION FOR WRIT OF MANDAMUS

REX E. RUSSO, ESQ.
PETITIONER — IN PROPER PERSON
1550 Madruga Ave., #323
Coral Gables, FL 33146
(305) 442-7393
email: RexLawyer@Prodigy.net
Florida Bar #0331597

COMES NOW the Petitioner, in proper person, and as a licensed member of the Florida Bar, and files this Petition for a Writ of Mandamus, directed to Respondents, Mary Cay Blanks, Clerk of the Third District Court of Appeal, in and for the State of Florida, and Leslie B. Rothenberg, Chief Judge of the Third District Court of Appeal, in and for the State of Florida and as grounds therefor states:

STATEMENT OF JURISDICTIONAL BASIS

This court has jurisdiction pursuant to Article V, §3(b)(8) of the Florida Constitution, and pursuant to Rule 2.420(i)(1) of the Florida Rules of Judicial Administration.

[DEFINITIONS USED HEREIN]

- “3D IOPs” refers to the Third District's Internal Operating Procedures.
- “[Ax ??]” refers to the Appendix filed with this 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.
- “Counsel” refers to the Petitioner.
- “Court” refers to either the Third District Court of Appeal or the Florida Supreme Court as determined in context.
- “Legislature” refers to the Florida legislature.
- “Rule(s)” refers to the Rules of Judicial Administration.
- “SC IOPs” refers to the Supreme Court’s Internal Operating Procedures.
- “Supreme Court” or “court” refers to the Florida Supreme Court.
- “Third District” refers to the Third District Court of Appeal.
(Other uses of the above terms shall be qualified in context.)

STATEMENT OF THE FACTS AND CASE

On September 26, 2017 counsel sent the clerk of the Third District a request for public records 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 under Rule 2.420(c)(1) [Ax 6-7].

Petitioner then filed a Petition for Mandamus before this court (Case No. SC18-55). However, the administrative writs justice determined that the matter was improperly filed before this court and referred the case to the Third District Court. A motion for rehearing followed, in which the inherent conflict of interest presented to each judge of the Third District was brought to the administrative writs justice's attention. The motion for rehearing was denied and the case was transferred.

Apparently, every member judge of the Third District recused themselves from the case, although no notice as such was filed. The chief justice of this court then entered an order assigning the member judges of the Fourth District to sit in

place of the member judges of the Third District, and authorized the chief judge of the Fourth District to make the panel assignment [Ax 109].

Without receipt of a motion from the respondent clerk, or from any third party, the assigned panel issued an order directing the petitioner to show cause why the petition "should not be dismissed as premature because petitioner did not direct his request for "administrative records" to the proper custodian, the Chief Judge of the Third District Court of Appeal..." [Ax 110]. Petitioner responded with argument based on the Florida Constitution, a statute designating the clerk as the custodian, as well as the Third District's own Internal Operating Procedures, and asserted that the clerk was the true custodian of the records regarding judicial assignments [Ax 111 to 121]. The panel was unconvinced and dismissed the petition without prejudice to petitioner recommencing his demand for public records by directing his request to the chief judge of the Third District [Ax 122].

Petitioner then sent the chief judge of the Third District a public records request which was nearly identical to the records request that had previously been sent to the clerk [Ax 123]. The chief judge responded with a letter that was nearly identical to the letter previously received from the clerk [Ax 126]. While both responses [Ax 7, Ax 126] clearly addressed the first point of counsel's requests [Ax 4, Ax 123], and purportedly addressed the second and third points, an exemption

pursuant to Rule 2.420(c)(1) was raised as to the remaining, very specific requests, concerning two separate cases before the district court.¹

NATURE OF RELIEF SOUGHT

Counsel seeks a writ of mandamus compelling the records custodian, whether that be the clerk, or the chief judge², or both, to fully comply with counsel's request for public record documents in accordance with Article I, section 24, of the Florida Constitution. A petition for writ of mandamus is the appropriate action for seeking enforcement of this constitutional right. *Minasian v. State*, 967 So. 2d 454 (Fla. 4th DCA 2007). To the extent the clerk is renamed in this current petition, it may be more appropriate to treat the petition with respect to the clerk as an appeal from the order dismissing the prior petition. *Rule 9.040(c), Fla. R. App. Proc.*

ARGUMENT IN SUPPORT OF THE PETITION

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

¹ Both cases for which records were requested actually each entail two separate appellate case filings. In the earlier set of cases, the two were consolidated. In the later set of cases, 3D17-0001 was not consolidation with the related appeal in case 3D17-1254 taken from a judgment awarding \$57,105 attorney fees.

² In both the response to the first letter request for public records [Ax 7] and the response to the second letter [Ax 126] the chief judge invited counsel to sit down and discuss the procedures of the court that do not otherwise appear in the Internal Operating Procedures. Following the second letter, counsel accepted the invitation. During the meeting, chief judge Rothenberg agreed that the clerk was the records custodian operating at the direction of the chief judge on behalf of the Third District. That concession was consistent with information received from the clerk in a telephone call placed by counsel prior to the first request.

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. . . .

Nowhere within the constitution is anyone required to advance a reason for the production of public records. *Fla. Const., Art. I, Sec. 24.* Nevertheless, petitioner has some very disconcerting reasons for insisting that his constitutional right to judicial branch public records is honored.

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. 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] 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 3D IOPs do not actually assure random assignment. In fact, the 3D 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 3D IOPs, as well as clearly stated rules within the 3D IOPs, provide opportunities for a judge to make their way onto a panel by design.

As stated in the 3D 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 3D 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]. Furthermore, no law or rule of court

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 3D 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 3D IOPs commanded blind assignment in every instance, including blind assignment of any substituted judge³, violation of the 3D IOPs would not *per se* give rise to a private enforceable right. A private cause of action requires a statute giving rise to a civil liability as opposed to one that protects public safety or welfare. *Murthy v. Sinha Corp.*, 644 So. 2d 983 (1994). The 3D IOPs are neither a statute nor give rise to a private right.

In the absence of any statutory requisite or rule of court assuring random assignments, the integrity in the methodology for panel assignments rests upon the public invoking their constitutional right to access of information, and individual litigants demanding their constitutional rights to due process. Due process “clearly

³ Compare the 3D IOPs with those of the SC IOPs which provide for blind assignment to preliminary panels, including blind assignment of any substitute judge.

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.

Relying on Article V, section 2 of the Florida Constitution, this court acted swiftly to institute Rule 2.420 (previously assigned as Rule 2.051) of the Florida Rules of Judicial Procedure and thus took advantage of the preservation clause at Article I, section 24(d) of the constitution. *In re Amend. Fla. R. of Jud. Admin.*, 608 So. 2d 471 (Fla. 1992). However, Article I, section 24(d) did not authorize this court to implement exemptions, which right is limited to the legislature, but merely preserves those exemptions in existence at the time the electorate passed the constitutional amendment adding Article I, section 24. This court's exemptions are in place only until such time as they are repealed by the legislature⁴. *Fla. Const., Art. I, section 24(c)*.

Regardless of the continued viability of the court's exemptions, 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

⁴ While a two-thirds vote is required from each legislative house in order to adopt a new exemption, no super-majority requirement is imposed for the repeal of the court's created exemptions.

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;

There is no specific exemption applicable to judicial assignment records. The determination of which judges shall sit on a panel is not "of a similar nature" to "court memoranda, drafts of opinions and orders, court conference records, notes," or other written material having to do with the process by which a panel decides a case.

Protecting judicial assignment records from disclosure as part of the court's secretive process to prevent improper influence on the panel potentially falls under the exemption at Rule 2.240(c)(2) or possibly Rule 2.240(c)(9)(A)(i), but not Rule 2.240(c)(1). Rule 2.240(c)(2) limits the exemption to the "degree, duration, and manner... necessary to protect the compelling governmental interest involved" and requires "a finding... that no less restrictive measures are available...." A similar limitation is placed on the exemption at Rule 2.240(c)(9)(A)(i). *See, Rules 2.240(c)(9)(B)&(C), Fla. R. Jud. Admin.* Since the purpose of the potential exemption was lost once the panel members were disclosed to the public⁵, there is no compelling reason to withhold the records.

⁵ The 3DCA 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 may encourage meddling by those who would dare to affect the sanctity of the judicial system — and who perhaps had no thought to meddle prior to learning of the assigned panel members.

While Rule 2.420 generally mirrors the constitutionally protected right of access to public records, the court's exemptions must be very narrowly interpreted so as to avoid the creation of what would effectively be an impermissible "new exemption". This court may not create new exemptions, because exemptions are in the realm of substantive law, and 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"). Upholding the Third District's exemption under Rule 2.420(c)(1) would do exactly that — effectively create a new exemption in violation of the constitution. Creation of new exemptions to the public's right to access records is within the sole realm of the legislature. *Fla. Const., Art. I, sec. 4(c)*.

CONCLUSION

The Third District's refusal to tender the records does not advance any legitimate interest of the court or state. Even if the clerk or chief judge had invoked an exemption under a rule that was specifically applicable, such an exemption would not be honoring the spirit of the constitutional right to disclosure of public records. 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).

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 custodian 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. Both the clerk and the chief judge must be mandated by writ to comply with the petitioner's constitutional right to receive the requested public records.

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 Respondents --- Mary Cay Blanks, Clerk of the Third District Court of Appeal, via email to BlanksM@flcourts.org; and to Leslie B. Rothenberg, Chief Judge of the Third District Court of Appeal, by service via email to RothenbL@flcourts.org --- on May 29, 2018.

/s/

REX E. RUSSO, ESQ.
1550 Madruga Ave., #323
Coral Gables, FL 33146
(305) 442-7393
RexLawyer@Prodigy.net
Florida Bar #0331597