

No. _____

In The
SUPREME COURT of the UNITED STATES

In re
REX E. RUSSO,
Petitioner,

v.

MARY CAY BLANKS,
as the 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.
1550 Madruga Ave., #323
Coral Gables, FL 33146
(305) 442-7393
RexLawyer@Prodigy.net

Question Presented for Review

Florida's Constitution provides every person with the right to inspect or copy any public record made or received by the judicial branch, except records exempted thereunder. *Fla. Const. art. 1, § 24*. The Florida Supreme Court acted swiftly to create judicial branch exemptions before section 24 became the law of Florida. *In re Amend. Fla. R. of Jud. Admin.*, 608 So.2d 471 (Fla. 1992). However, no exemption prevents a person's right to inspect or copy records disclosing how judges of Florida's District Courts of Appeal were chosen to hear the merits of an appeal (i.e. documents disclosing whether the three panel members were randomly assigned, assigned by the chief judge, chose themselves, or otherwise). See *Fla. R. Jud. Admin. 2.240* (previously assigned as Rule 2.051). Yet, following respondent's refusal to fulfill petitioner's demand for such records, the Florida Supreme Court denied issuance of a writ of mandamus. In its denial, the court never mentioned the Florida constitution; never mentioned the nature of the request; never asserted that an exemption applied; and, found instead that petitioner had "failed to show a clear legal right to the relief requested."

Has the failure of Florida's judicial branch to recognize the clear Florida constitutional right deprived petitioner of his equal rights as guaranteed under the 14th Amendment of the United States Constitution?

List of Parties

Petitioner is Rex Edward Russo, an attorney in good standing with the Bar of the State of Florida and a member of the Bar of this Court. Petitioner is also both a resident and citizen of the State of Florida.

Respondent is the Clerk of Florida's Third District Court of Appeal and has been designated by the Florida courts as the party respondent to be named on behalf of The Third District Court of Appeal in and for the State of Florida.

Although not named as a party respondent, Florida's Third District Court of Appeal is considered to be a proper party respondent to the petition. *See Fla. R. App. Proc. 9.100(e)(1)&(2).*

Although not named as a party respondent, the Chief Judge of Florida's Third District Court of Appeal is considered and otherwise treated herein as a proper party respondent to the petition. *See Fla. R. App. Proc. 9.100(b)(3).*

Although neither named a party respondent nor considered a proper party respondent, the Florida Supreme Court will be treated as an interested party and is being served in the event said court is considered by others to be a proper party respondent. *See Fla. R. App. Proc. 9.100(e)(1)&(2).*

Proceedings Directly Related

Rex E. Russo v. Mary Cay Blanks, Clerk

Case No. SC18-55, Florida Supreme Court

Disposition: Petition for Mandamus transferred to
Third District Court of Appeal in and for
the State of Florida.

Order entered: February 5, 2018

Rex E. Russo v. Mary Cay Blanks, Clerk

Case No. 3D18-419, 3rd Dist. Crt. of Fla. (on transfer)

Disposition: All members of the court recused
themselves from the case. By order of
the Chief Judge of the Florida Supreme
Court the case was transferred to judges
of the Fourth District Court of Appeal in
and for the State of Florida although it
remained a Third District case. Case
dismissed without prejudice to
petitioner directing records request to
the Chief Judge of the Third District
Court of Appeal instead of the Clerk.

Order entered: April 30, 2018

Note: First records request was to the Clerk. Both requests were denied by the Chief Judge of the Third District Court. A second petition was then filed. In reply to the second petition the Clerk stated she was the proper party respondent, and the court apparently agreed, thus the style of the order dismissing the second petition for mandamus [Appx. p. 9].

Table of Contents

Question Presented for Review	i
List of Parties	ii
Proceedings Directly Related	iii
Table of Contents	iv
Table of Cited Authorities	v
Citation to Report of the Denial Order.	1
Statement of Jurisdictional Basis	1
Constitutional Provisions Involved	1
Statement of the Case	3
Reasons for Granting the Petition	
Petitioner Has a Clear Legal Right —	4
Respondent Has No Applicable Exemption —	5
No Other Adequate Means to Attain Relief —	7
Importance Beyond this Case —	7
Conclusion	8
Appendix	
A. Florida Supreme Court’s Dismissal Order. . .	9
B. Written Request for Records	10
C. Clerk’s Reply to the Request	16
Signature	18

Table of Cited Authorities

United States Constitution:

<i>U.S. Const. art. 3, §2</i>	1
<i>U.S. Const. amend. XIV, § 1</i>	i, 1, 8

Florida Constitution:

<i>Fla. Const. art. 1, § 24</i>	i, 1, 4
<i>Fla. Const. art. 1, § 24(a)</i>	2
<i>Fla. Const. art. 1, § 24(c)</i>	2, 5
<i>Fla. Const. art. 1, § 24(d)</i>	3
<i>Fla. Const. art. 2, § 3</i>	5

Federal Statutes:

<i>28 U.S.C. § 1361</i>	7
<i>28 U.S. Code § 1651(a)</i>	1

Florida Rules of Judicial Administration:

<i>Fla. R. Jud. Admin. 2.240</i>	i
<i>Fla. R. Jud. Admin. 2.420(a)</i>	3
<i>Fla. R. Jud. Admin. 2.420(b)(4)</i>	4
<i>Fla. R. Jud. Admin. 2.420(c)(1)</i>	3, 4, 6

Florida Rules of Appellate Procedure:

<i>Fla. R. App. Proc. 9.100(b)(3)</i>	ii
<i>Fla. R. App. Proc. 9.100(e)(1)</i>	ii
<i>Fla. R. App. Proc. 9.100(e)2)</i>	ii
<i>Fla. R. App. Proc. 9.100(h)</i>	3

Federal Cases:

<i>Bracy v. Gramley</i> , 520 U.S. 899 (1997)	7
<i>Clemente Javierre v. Central Altagracia</i> , 217 U.S. 502 (1910)	5
<i>DeBeers Consol. Mines, Ltd. v. United States</i> , 325 U.S. 212 (1945)	8
<i>In re Volkswagen of America, Inc.</i> , 545 F.3d 304 (5th Cir. 2008)	8
<i>Spradling v. Texas Dunn v. Texas</i> , 455 U.S. 971 (1982)	5
<i>United States v. Bertoli</i> , 994 F.2d 1002 (3d Cir. 1993)	7

Florida Cases:

<i>Huffman v. State</i> , 813 So.2d 10 (Fla. 2000)	4
<i>In re Amend. Fla. R. of Jud. Admin.</i> , 608 So.2d 471 (Fla. 1992)	i
<i>Massey v. David</i> , 979 So.2d 931 (Fla. 2008)	5
<i>Microdecisions, Inc. v. Skinner</i> , 889 So.2d 871 (Fla. 2d DCA 2004)	4
<i>Minasian v. State</i> , 967 So.2d 454 (Fla. 4th DCA 2007)	5
<i>Warden v. Bennett</i> , 340 So.2d 977 (Fla. 2d DCA 1976)	4

Citation to Report of the Denial Order

Rex E. Russo vs. Mary Cay Blanks, Clerk,
SC18-886 (Fla. Oct. 29, 2018).

Statement of Jurisdictional Basis

This court has jurisdiction pursuant to Article III, section 2, of the United States Constitution which empower's this court to act in "all cases, in law and equity, arising under [the] Constitution." Issuance of a writ of mandamus in aid of such jurisdiction is authorized by 28 U.S. Code § 1651(a).

Federal and State Constitutional Provisions

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1

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. . . .

Fla. Const. art. 1, § 24(a)

This section shall be self-executing. The legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) . . . , provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, . . .

Fla. Const. art. 1, § 24(c)

All laws that are in effect on July 1, 1993 that limit public access to records or meetings shall remain in force, and such laws apply to records of the legislative and judicial branches, until they are repealed. Rules of court that

are in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed.

Fla. Const. art. 1, § 24(d)

Statement of the Case

Petitioner sent respondent a written request for public records pursuant to Article I, Section 24 of the Florida Constitution and as promulgated in the court's rules [Appx. p. 10]. See *Fla. R. Jud. Admin. 2.420(a)*. The request sought production of specific documents demonstrating all manner and method by which judges of the court were empaneled for two concluded consolidated appeals and another concluded unrelated appeal. Responding through the chief judge of the Third District Court, the clerk asserted that the records were exempt under Rule 2.420(c)(1) of the Florida Rules of Judicial Administration [Appx. p. 16].

A petition for mandamus was filed before the Florida Supreme Court challenging the claimed exemption as non-applicable.¹ Finding a preliminary basis for relief, the court issued an order requiring a response. See *Fla. R. App. Proc. 9.100(h)*. In response, the clerk, represented by members of Florida's Third District Court of Appeal, continued to

1. Florida Supreme Court documents are available at: <http://onlinedocketssc.flcourts.org> Enter case #SC18-886.

argue against production alleging that those records were intertwined with information exempted by Rule 2.420(c)(1) of the Florida Rules of Judicial Administration. Petitioner filed a reply explaining that the exempted information may be redacted, but that the non-exempted matter had to be produced. *See Fla. R. Jud. Admin. 2.420(b)(4)*.

In an unelaborated order the Florida Supreme Court denied the petition for mandamus finding no clear legal right to such relief [Appx. p. 9].

Reasons for Granting the Petition

Petitioner Has a Clear Legal Right —

Nowhere within the Florida Constitution is anyone required to advance a reason for the production of public records.² *Fla. Const. art. 1, § 24*. Unlike an asserted common law right that a petitioner must first demonstrate in order to obtain mandamus (*e.g. Huffman v. State*, 813 So.2d 10 (Fla. 2000)) as cited in the Florida Supreme Court's denial order [Appx. p. 9], Florida's Constitution provides an undeniable organic right to non-exempt public records – including those of the judiciary. The right is straight forward, broad and encompassing.

2. In cases presented under Florida's non-organic Freedom of Information Act (*see Fla. Stat Ch. 119*) Florida courts have recognized the irrelevance of motive. *Microdecisions, Inc. v. Skinner*, 889 So.2d 871, 875 (Fla. 2d DCA 2004) (intent to use in a commercial enterprise); *see also Warden v. Bennett*, 340 So.2d 977, 978 (Fla. 2d DCA 1976) (intent to use in labor organizing).

Mandamus was the proper petition to enforce that right. *Minasian v. State*, 967 So.2d 454 (Fla. 4th DCA 2007).

Although, the United States Constitution does not itself guarantee a direct right to any records of the legislative, executive, or judicial branches of government, the Florida electorate opened their public records to scrutiny. Since scrutiny was so provided, “it may not be denied arbitrarily without violating the Equal Protection Clause.” *See Spradling v. Texas Dunn v. Texas*, 455 U.S. 971 (1982). The burden is then upon the clerk to demonstrate that the exemption is applicable. It has been a long standing principal that “[w]hen a proviso ... carves an exception out of the body of a statute or contract those who set up such exception must prove it.” *Clemente Javierre v. Central Altagracia*, 217 U.S. 502 (1910).

Respondent Has No Applicable Exemption —

Following the 1992 passage of the constitutional amendment, Florida’s courts were no longer empowered to create exemptions, which right is reserved to the legislature. *See Fla. Const. art. 1, § 24(c)*. Accordingly, any preserved exemption must be precisely met, otherwise a court would be effectively creating a new exemption and stepping upon the province of the Florida legislature. *See Fla. Const. art. 2, § 3; and see 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”).

The exemption invoked by the clerk 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.

Fla. R. Jud. Admin. 2.420(c)(1).

However, petitioner's request is for very specific information that is not of the type addressed by the exemption. No rule, no statute, and no constitutional provision specifically exempts judicial assignment records. Likewise, no rule, no statute, and no constitutional provision impliedly exempts judicial assignment records requested after a case has been determined. The manner by which judges were assigned to a panel is not "of a similar nature" to "court memoranda, drafts of opinions and orders, court conference records, notes," or to other written material having to do with the process by which a panel decided a case.

Conflating the assignment of judges with that of "decision making" would insult the bedrock principal of due process and the right to an impartial

panel. *See Bracy v. Gramley*, 520 U.S. 899 (1997). It would deflate judicial integrity by equating “decision making” with the prior function of determining panel members — who may be predisposed to one side’s argument over the other’s.

If the Florida Supreme Court believed the exemption to be applicable, then it should have said so in an opinion — after recognizing the broader constitutional right. Then, no matter how wrong the opinion, there would have at least been case law applicable to all in Florida, instead of an obscure result of failed constitutional recognition applicable only to petitioner.

No Other Adequate Means to Attain Relief —
Petitioner has no other means to enforce his rights. Mandamus jurisdiction of federal district courts extends only to officers, employees, or agencies of the United States. *See 28 U.S.C. § 1361*. There is no higher state court and no method for enforcement by petition to the Florida legislature.

Importance Beyond this Case —

Equal rights challenges under a state’s constitution are rarely reviewed thereby potentially encouraging audacious indifference by Florida courts, or other state courts, to enforcement of their organic law. Writs of mandamus being supervisory in nature are appropriate to cure such issues. *See United States v. Bertoli*, 994 F.2d 1002, 1014 (3d Cir. 1993). There is nothing that would render it inappropriate to issue

the writ. *See In re Volkswagen of America, Inc.*, 545 F.3d 304 (5th Cir. 2008).

Conclusion

In the absence of an exemption and impotent to create a new one, Florida's Supreme Court elected to simply ignore petitioner's constitutional right as demonstrated by its unelaborated order which neither mentioned the nature of the request nor the Florida constitutional right thereto. Avoidance of a constitutional right is tantamount to an illegitimate revision. It was, at the very least, an *ad hoc* obfuscation and thus an affront to petitioner's equal rights as guaranteed to him by the 14th Amendment of the United States Constitution. Such action falls squarely within the category of "usurpation of power" against which mandamus is classically available. *DeBeers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945).

WHEREFORE, a writ of mandamus must issue compelling the clerk of Florida's Third District Court to produce the requested public records, redacted of any exemptible matter; and, the mandate should order that a non-redacted copy of the records be provided to the court so that this Supreme court may ascertain whether only exemptible matter was redacted.

Supreme Court of Florida
Monday, October 29, 2018

Case No.: SC18-886

REX E. RUSSO vs. MARY CAY BLANKS,
CLERK

Petitioner(s) Respondent(s)

Because petitioner has failed to show a clear legal right to the relief requested, he is not entitled to mandamus relief. Accordingly, the petition for writ of mandamus is hereby denied. *See Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000).

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

PARIENTE, LEWIS, QUINCE, POLSTON, and LAWSON, JJ., concur.

A True Copy

Test:

_____/s/_____

(Seal of the Court)

John A. Tomasino
Clerk, Supreme Court

lc

Served:

REX E. RUSSO
HON. MARY CAY BLANKS, CLERK
MICHAEL WILLIAM MERVINE

REX E. RUSSO
Attorney and Counselor at Law
KENDAR BUILDING
1550 Madruga Ave., Ste. #323
Coral Gables, FL 33134

Telephone 305-442-7393 RexLawyer@prodigy.net
Fax 786-524-0573 www.FloridaPropertyLitigation.com

May 1, 2018

Leslie B. Rothenberg, Chief Judge
Third District Court of Appeal
2001 S.W. 117th Avenue
Miami, FL 33175

Re: Request for Public Record Information

Your Honor:

Pursuant to Article I, section 24 of the Florida Constitution, Chapter 119 of the Florida Statutes, and Rule 2.420 of the Florida Rules of Judicial Administration, I am requesting an opportunity to inspect or obtain copies of the following public records:

- All administrative orders, directives, memorandum, notes, letters, requests, judges' assignment records, or communiques of any sort establishing a panel for Case No. 3D15-1437.

- All administrative orders, directives, memorandum, notes, letters, requests, judges' assignment records, or communiques of any sort establishing a panel for Case No. 3D15-2330.
- All administrative orders, directives, memorandum, notes, letters, requests, judges' assignment records, or communiques of any sort regarding any changes to the panel for Case No. 3D15-1437.
- All administrative orders, directives, memorandum, notes, letters, requests, judges' assignment records, or communiques of any sort regarding the order consolidating Case No. 3D15-2330 into Case No. 3D15-1437, and resetting the date or time for oral argument.
- All memorandum, notes, letters, requests, judges' assignment records, 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, requests, judges' assignment records, or communiques of any sort regarding the dissemination of information as to the composition of the panel for Case No. 3D15-2330, whether disseminated only to the panel judges, some judges of the court, all judges of the court, or the public.

- All memorandum, notes, letters, requests, judges' assignment records, 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, requests, judges' assignment records, or communiques of any sort establishing a panel for Case No. 3D17-0001.
- All administrative orders, directives, memorandum, notes, letters, requests, judges' assignment records, or communiques of any sort regarding any changes to the panel for Case No. 3D17-0001.
- All administrative orders, directives, memorandum, notes, letters, requests, judges' assignment records, or communiques of any sort regarding the order in Case No. 3D17-0001 resetting the date or time for oral argument.
- All memorandum, notes, letters, requests, judges' assignment records, or communiques of any sort regarding the dissemination of information as to the composition of the originally assigned panel for Case No. 3D17-0001, whether disseminated only to the panel judges, some judges of the court, all judges of the court, or the public.

- All memorandum, notes, letters, requests, judges' assignment records, 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.

I request a waiver of all fees for this request since the disclosure of the information I seek is not primarily in my commercial interest, and is likely to contribute significantly to public understanding of the operations or activities of the court, making the disclosure a matter of public interest. Furthermore, I suspect that most of these documents are in the form of electronic media, or can be readily scanned into electronic form, and accordingly would accept electronic production of the documents to my email address thus considerably mitigating costs to the court. In fact, transmittal by electronic media via email is preferable.

Should you deny my request, or any part of the request, please state in writing the basis for the denial, including the exact constitutional citation, rule citation, case citation, or statutory citation you believe authorizes the denial.

If records within your control, as custodian of the requested records as asserted by "the Court," are not presently in your physical possession but later received from others in order to comply with this request, please state the persons or entities from whom the particular record was received.

If you know or suspect that records responsive to this request are in the hands of others, and you have not obtained those records, especially those records that would fall within your control as the records custodian as asserted by "the Court," please state the persons or entities that have or might have possession of those particular records.

Although this request is being made after the dismissal of Case No. 3D18-0419, a petition for mandamus naming the Clerk of the Court as respondent from whom production of these documents had been requested, it is not to be deemed in any manner a waiver of remaining rights, if any, to proceed further with that petition. This request is not to be deemed an admission that the court was correct to dismiss the petition in 3D18-0419. This is not to be deemed an agreement or acceptance of any term proposed or stated by the court in 3D18-0419. The dismissal order in 3D18-0419 stated the dismissal was without prejudice to making this request to you as the designated records custodian of what "the Court" deems "administrative records." However, I do not act upon that as a grant of authority, as I believe this request necessarily survives the dismissal of 3D18-0419 as a matter of right.

I will contact your office within one week to discuss when I may expect fulfillment of my request, and arrange payment of any statutorily prescribed fees. If you have any questions in the interim, please do not hesitate to contact me.

Very Truly,

/s/

Rex E. Russo

cc: John A. Tomasino
Clerk of the Florida Supreme Court
500 South Duval Street
Tallahassee, FL 32399-1927

Mary Kay Blanks
Clerk of the Third District Court
2001 S.W. 117th Avenue
Miami, FL 33175

(Seal of the Court)

DISTRICT COURT OF APPEAL
THIRD DISTRICT
2001 S.W. 117 AVENUE
MIAMI, FLORIDA 33175-1716

Telephone (305) 229-3200

May 8, 2018

Rex E. Russo, Esquire
Law Office of Rex E. Russo
Kendar Building
1550 Madruga Avenue, Suite 323
Coral Gables, FL 33134

Re: Request for Information

Dear Mr. Russo,

You have requested information pursuant to Chapter 119 of the Florida Statutes, Article I, section 24 of the Florida Constitution, and Rule 2.420 of the Florida Rules of Judicial Administration. The judicial branch is not governed by Chapter 119, see *Times Publishing Company v. Ake*, 660 So. 2d 255 (Fla. 1995). However, the Court has considered your request for information for judicial branch public records pursuant to Article 1, Section 24 of the Florida Constitution, and Rule 2.420 of the Florida Rules of Judicial Administration.

Please find attached, the Third District Court of Appeal's Internal Operating Procedures (IOP), which includes all amendments in existence on July 1, 2015, or that came into existence thereafter. The IOP is being provided to you electronically along with a copy of this letter by email in response to your request for procedures relating to assignment of judges and cases, as well as procedures for publishing the assigned judges of the Third District Court of Appeal. Any other records which may exist relating to your request in your letter dated May 8, 2018, have been determined by the Court to be confidential and exempt records pursuant to Florida Rule of Judicial Administration 2.420(c)(1).

Although the additional "records" you have requested are exempt pursuant to Rule 2.420(c)(1), I have previously extended and continue to extend my invitation to you to meet with me to discuss any further questions you may have regarding procedures not expressly provided in the Court's IOP. There is no mystery regarding the procedures you have inquired about. I have spoken about them at several seminars, and I am happy to discuss them with you.

Please let me know if I can provide any further assistance to you regarding this matter.

Sincerely,

/s/
Leslie B. Rothenberg
Chief Judge
Third District Court of Appeal

Signature of Petitioner

Respectfully Submitted by —

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

Rex E. Russo
*Pro Se Petitioner, is an
attorney licensed in the State
of Florida (Lic. #331597) and
a member of the Bar of this
Court.*