

No. \_\_\_\_\_

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In The  
SUPREME COURT of the UNITED STATES

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*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.*

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PETITION FOR WRIT OF MANDAMUS

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### 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 14<sup>th</sup> 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].

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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.<sup>1</sup> 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

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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.<sup>2</sup> *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.

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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 14<sup>th</sup> 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.