No. 18-1014

In The

Supreme Court of the United States

IN RE REX E. RUSSO,

Petitioner,

vs.

MARY CAY BLANKS,
Clerk of the District Court
of Appeal of Florida, Third District,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Florida

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED
[Restated]

Has the Petitioner presented any federal constitutional or other basis, whether considered under the extraordinary writ of mandamus or of certiorari, to warrant the exercise of jurisdiction by this Court?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Respondent is the long-serving Clerk of one of Florida's five District Courts of Appeal. The Third District encompasses Miami-Dade County and Monroe County, Florida. The Court's ten Judges hear and decide appeals from trial court and administrative orders and judgments within the District in randomly-assigned three-Judge panels. Fla. Const. art. V, § 4.

The Respondent was appointed by the Third District's Judges, art. V, § 4(c), but her duties with respect to Court records have been established by the Florida Supreme Court in Florida Rule of Judicial Administration 2.420. Rule 2.420(c), "Confidential and Exempt Records," details the categories of records of the judicial branch which "shall" be confidential.

The Petitioner is a Florida-licensed attorney who appeared before appellate panels of the Third District in the three cases identified in his "Request for Public Information" letter of May 1, 2018 [Petr. App. 10]. After briefing and oral argument by the Petitioner in those cases, the Court ruled against him. He then made his request for records pertaining to the composition of the panels in those cases.

The Respondent provided responsive records and links to numerous publicly-available Court website compilations of information, including past and current oral argument calendars, recorded video of the

oral arguments in the cases, and the Court's internal operating procedures.

The Petitioner then filed a petition for a writ of mandamus in the Florida Supreme Court seeking to compel the Third District to "fully comply with counsel's [Petitioner's] request for public records in accordance with Article I, section 24, of the Florida Constitution." The Respondent filed a brief in opposition to the petition, and the Florida Supreme Court denied that petition in an order issued October 29, 2018. *Russo v. Blanks, Clerk*, Case No. SC18-886 [Petr. App. 1].

The Petitioner then sought mandamus in this Court. On January 28, 2019, the Court recast the petition as one in certiorari rather than mandamus and directed that any response be filed by March 8, 2019.

ARGUMENT

I. The Petition does not establish any basis for jurisdiction.

The statutory authority for the issuance of the writ of mandamus sought by the Petitioner is found in the All Writs Act, 28 U.S.C. § 1651(a), authorizing "The Supreme Court and all courts established by Act of Congress" to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." A writ of mandamus is an extraordinary and drastic remedy. *Cheney v. U.S.*

Dist. Court for Dist. of Columbia, 542 U.S. 367, 380 (2004); *Gulfstream Aerospace Corp. v. Mayacamus Corp.*, 485 U.S. 271 (1988). Mandamus, prohibition, and certiorari alike "are drastic and extraordinary remedies" to be "reserved for really extraordinary causes," in which "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947).

In this case, the Florida Supreme Court was petitioned for a writ of mandamus and denied the petition.[1] The Florida Supreme Court is the very Court that issued Florida Rule of Judicial Administration 2.420(c), establishing which state court judicial records are confidential and exempt from Florida's public records laws.

The Petition in the present case does not seek: to compel a lower court to comply with the mandate of the Supreme Court of the United States, as in *Deen v. Hickman*, 358 U.S. 57 (1958); to correct a jurisdictional error on the part of a lower federal court, as in *Kerr v. U.S. District Court for N. Dist. of Cal.*, 426 U.S. 394 (1976); or to preserve the Supreme Court's own jurisdiction from being vitiated by the unlawful action of a lower court.

Supreme Court Rule 20 governs the procedure on a petition for an extraordinary writ. The Rule states

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[1] Although the last action denying relief to the Petitioner was an act of the Florida Supreme Court, the Petitioner's list of parties states that the Florida Supreme Court is "neither named a party respondent nor considered a proper party respondent." [Petition at ii].

that the issuance of such a writ by the Court "is not a matter of right, but of discretion sparingly exercised."

> To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

This Court has recast the Petition for Mandamus as one for certiorari, but review under certiorari is also unfounded. Supreme Court Rule 10(b) and (c) illustrate the types of state court decisions considered for review of a state court decision:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

No such circumstances are present here. Rule 10 also states that a petition for a writ of certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." These are precisely the types of error advanced by the Petitioner.

The Petition now before the Court, whether considered on mandamus or certiorari, establishes no basis for jurisdiction. Respectfully, the Court should deny the Petition.

II. The issues sought to be raised by the Petitioner, an attorney seeking certain internal state appellate court records relating to three cases in which his client did not prevail, were addressed to, and correctly rejected by, Florida's highest court.

The Florida Supreme Court was presented with a Petition for Mandamus as well as complete appendices prepared by the Petitioner and the Respondent, including the document requests, archived court calendars for the three cases unsuccessfully argued by the Petitioner, and information regarding readily-available access on line to the archived oral argument videos.

The Petitioner concedes that "the United States Constitution does not itself guarantee a direct right to any records of the legislative, executive, or judicial branches of government" [Petition at 5], but claims that Florida's law assuring access to public records were "denied arbitrarily," thus violating the Equal Protection Clause of the United States Constitution.

The Petitioner did not allege in the Florida courts, much less establish, that his access to public records was arbitrarily rejected or that his requests were treated in a discriminatory or disparate manner. His citation to *Spradling v. Texas*, 455 U.S. 971 (1982), is

inapposite. That case holds that state appellate review of a claim of former jeopardy (a violation of the Double Jeopardy Clause), once provided, "may not be denied arbitrarily without violating the Equal Protection Clause." *Id.* at 973. The sentences that follow that quotation, however, clarify that the "[f]undamental precepts of due process require a right to be heard 'at a meaningful time' before suffering a grievous loss." *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The loss of appellate review of a Double Jeopardy claim is readily distinguishable from the considered denial of access to a judicial record governed by a rule promulgated by Florida's highest court.

A. The Petitioner acknowledges that his purported claims arose under art. I, § 24, of the Florida Constitution, and that § 24 is subject to specific judicial branch exemptions.

The availability and confidentiality of judicial branch records is governed by the Florida Supreme Court, and not by Florida's separate public records statutes. *Times Publishing Company v. Ake*, 660 So. 2d 255 (Fla. 1995). The Florida constitutional provision invoked by the Petitioner, art. I, § 24, adopted in 1992, expressly recognizes in subsection (d) the continued primacy of the rules of court already in existence limiting access to judicial branch records ("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.").

The Petitioner concedes that the Florida Supreme Court adopted the rules of court limiting access to judicial records before 1992, though implying some nefarious purpose in the timing of that action.[2]

B. The Petitioner received all the records he requested from the Respondent that were non-exempt, and from the Court's publicly-available records he could have confirmed that the Respondent Clerk randomly assigns the Court's judges to three-judge appellate panels calendared months in advance of the assignment of specific cases to those panels.

The Petition provides no clarity regarding the records alleged to have been arbitrarily withheld in violation of the United States Constitution. Because any attorney or member of the public may use the Third District's website, or a visit to the Respondent's office at the Court, to obtain the identity of the judges on all the oral argument panels for a year of oral argument (using the archived weekly calendars identifying the panel members approximately ten days before the argument), it becomes obvious that the panels are randomly and equitably distributed among the Third District's ten appellate judges, with occasional substitutions of a panel position for recusals, illness, family

[2] As part of the "Question Presented for Review," the Petitioner states, "The Florida Supreme Court acted swiftly to create judicial branch exemptions before section 24 became the law of Florida."

emergencies, or retirement, specific to an individual judge of the Court.

The Court's manual of internal operating procedures was also provided to the Petitioner, allowing the Petitioner to review the procedures applicable to the Clerk and Court in assigning a particular case to a pre-assigned panel once the case is ready to be argued or decided without argument.

C. The Petitioner has not alleged or established any deprivation by the Respondent of Petitioner's "equal rights as guaranteed under the 14th Amendment of the United States Constitution."

The Petitioner has not explained, and cannot, how the actions of the Respondent "deprived petitioner of his equal rights as guaranteed under the 14th Amendment of the United States Constitution." [Petition at i]. The Petitioner obtained due process by presenting his legal theories and claims to the Third District and the Florida Supreme Court. The denial of a limited number of those claims based on a rule protecting internal court records is not a deprivation of equal rights or due process. The Petitioner does not rely on a record even hinting that he was treated differently than other persons seeking access to the Third District's records, or that the consideration given to those claims was "arbitrary." Indeed, the Florida Supreme Court's denial order [Petition at 9] cited a prior Florida Supreme Court

case and was issued by five concurring Justices without dissent.

CONCLUSION

The Petitioner has not demonstrated any basis for the exercise of this Court's extraordinary writ jurisdiction. The Respondent respectfully submits that the Petition should be denied.

Respectfully submitted,

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