No. 24-285

In the
Supreme Court of the United States

Robert M. Rogers

Petitioner,

v

Jackson County, a Political Division of the State of Florida,
James D. Peacock, individually, also a County Commissioner, and
Colby B. Willoughby, a resident of Alabama.

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Robert M. Rogers, PhD
pro se
3705 N.W. 24th Place
Gainesville, FL 32605
rmrogerscourt@gmail.com

(a) Question Presented

From the 11th Circuit Court of Appeals Opinion in Case No. 23-11732, affirming the District Court's Order, denying a rehearing, the Petitioner presents the following question for review and consideration:

> **Does the 1923 Florida Supreme Court embezzlement Case of *Kirkland v State*, 86 Fla. 64, 97, So. 502 (1923) excuse Jackson County's acquiescence to County Commissioner Peacock to create a custom or practice to deny Due Process for the Plaintiff's right to be heard?**

This question is central to the District Court's judgment and Appeals Court's affirmation, excusing Respondent Jackson County Board of County Commissioners from the actions of County Commissioner Respondent James D. Peacock.

Florida Court Cases that apply *Kirkland v. State* deal with misuse of an official office for personal gain. In the 1966 Case of *Padgett v. Bay County*, the 1st District Court of Appeals of Florida recognized that context matters and held that:

> **"The cited case of *Kirkland v. State,* 86 Fla. 64, 97, So. 502 (1923) has no application to the case at bar." "In the case before us, the Commissioner in whose district the questioned work was done, did not derive any monetary or other compensation thereof."**

The District and Appeals Courts' holding otherwise, as in their recorded opinion, is ripe for abuse.

(b-1) Certificate of Interested Persons

The persons and entities known to Petitioner Robert M. Rogers, as interested in the outcome of this matter, are as follows:

1. Florida Association of Counties Trust, insurer for Respondents Jackson County and James Peacock,
2. Frank, Michael J., United States District Magistrate Judge,
3. Jackson County, Respondents,
4. Krebs, Eric A., Counsel for Respondent Jackson County,
5. Peacock, James D., Respondent,
6. Rogers, Robert M. Petitioner & property owner,
7. Taylor, Jason C., Counsel for Respondent James D. Peacock,
8. The Krizner Group, Counsel for Respondent James D. Peacock,
9. Warner Law Firm, P.A., Counsel for Respondent Jackson County,
10. Warner, William G., Counsel for Respondent Jackson County,
11. Willoughby, Colby B., Respondent,
12. Yarbrough, Alyssa M., Counsel for Respondent Jackson County.
13. Baxter, Jim Bob, local farmer and 5-year leaseholder since 2014.

(b-2) Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-5, no publicly traded company or corporation has an interest in the outcome of the case or the appeal.

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Petition for a Writ of Certiorari[1]

(b-3) Proceedings Below

1) In the **14th Judicial Circuit in and for Jackson County** as Case No. 2020-CA-000021, a Complaint was filed on January 16, 2020, against Respondents Jackson County and James D. Peacock individually and in his capacity as a county commissioner. A hearing on the Petitioner's Motion for temporary injunctive relief was held on June 19, 2020. A Transcript of that hearing was made. Discovery ensued and a subpoena for the County's survey withheld during this June 2020 hearing was issued in September 25, 2020. The court ordered the Petitioner to amend and join Willoughby as an indispensable party. The Petitioner voluntarily dismissed this Case on October 12, 2022.

2) In the Federal District Court for Northern District of Florida as Case No. 5:22cv237-TKW-MJF was filed in October 12, 2022, with a Complaint against Respondents Jackson County and James D. Peacock individually and in his capacity as a county commissioner with a demand for Jury Trial. A second amended complaint was filed in March 2023 adding Respondent Willoughby. The County Respondents responded to the second amended complaint with a motion to dismiss under Fed. R. Civ. P. 12 (b) (6)[2]. Respondent Willoughby was served but did not

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[1] Prepared in accordance with U.S. Supreme Court Rule 14

[2] A Court reviewing a motion to dismiss under Rule 12 (b) (6) must accept as true all of the factual allegations contained in the complaint and draw all inferences in favor of the nonmoving party. *Autor v. Pritzer*

participate and was in default. Fed. R. Civ. P. 19 was not addressed. The District Court Dismissed the Petitioner's Federal Complaints against Jackson County and James D. Peacock with Prejudice on April 26, 2023. In its ORDER, this Court stated that it took Judicial Notice of the Circuit Court's Docket and Transcript (Docket #34-4), but without Notice to the Parties, failing to recognize the withheld survey's evidence (Docket #34-2) revealed during the Circuit Court hearing.

3) In the 11th Circuit Court of Appeals, as Case No. 23-11732, the Petitioner's timely Brief was filed on November 13, 2023. The Petitioner filed a Motion for Leave to Amend Pleadings on March 3, 2024, to incorporate newly available countering evidence for the Petitioner's berm's potential to hold water. On March 28, 2024, the Court of Appeals affirmed the District Court's Order. The Petitioner submitted a timely Petition for Rehearing *en banc* on April 4, 2024, and was denied on May 8, 2024.

(e) Jurisdiction

The District Court has jurisdiction under 28 U.S.C. § 1331 because Petitioner raises questions under the U.S. Constitution, 42 U.S.C. § 1983 and 28 U.S.C. § 1343 (a) (3) because Petitioner challenges Respondent Peacock's and the County's deprivation of his rights under color of state law; and under 28 U.S.C. § 2201 because Petitioner seeks injunctive relief.

The judgment of the Court of Appeals was entered on March 28, 2024. A timely petition for

Rehearing *en banc* was denied on May 8, 2024. This Court's jurisdiction rests on 28 U.S.C. § 1254.

(f) Constitutional Provisions

This is an action brought pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343 (a) (3), 28 U.S.C. § 2201, the Fifth and Fourteenth Amendments of the United States Constitution, the Florida Constitution and Florida common law

In the Federal District Court for Northwest Florida, a second amended complaint was filed in March 2023, alleges procedural due process claims against Jackson County (Count I) and Commissioner Peacock (Count II) under 42 U.S.C. §1983, an equal protection claims against Commissioner Peacock under 42 U.S.C. §1983 (Count III), and state law claims against Jackson County (Counts IV and V), and against Mr. Willoughby as nuisance and trespass claims Counts VI and VII).

(f-1) Due Process

The Petitioner's Second Amended Complaint states a claim upon which relief can be granted against Respondents Jackson County and Peacock for violations of the Petitioner's constitutional right to procedural due process.

> "70. Petitioner is entitled to the protections and remedies afforded under 42 U.S.C. § 1983. The actions of Mr. Peacock and the County as alleged ***supra*** reflect official action taken by Mr. Peacock

on behalf of the County which has affected the property rights of Petitioner."

75. Instead, in derogation of the County's duty to provide notice and an opportunity to be heard before taking County action, Mr. Peacock ordered the demolition of Petitioner's property utilizing County resources in violation of the Due Process Clause of the U.S. Constitution.

80. Mr. Peacock's intentional actions as alleged herein, deprived Petitioner of his constitutionally protected property rights without prior notice or an opportunity to be heard, to include the notice and hearing procedures provided in § 2-1(a) and (b) of the Code of Ordinances for Jackson County"

(f-2) <u>Equal Protection</u>

The Petitioner's Second Amended Complaint states a claim upon which relief can be granted against Respondent Peacock, in his individual capacity, for violation of the Petitioner's constitutional right to due process of law and equal protection.

"88. Petitioner is similarly situated to the Willoughbys, in that he has been treated in an arbitrarily discriminatory manner by Mr. Peacock through his actions regarding the frequent flooding on Garrett Road, whereas the Willoughbys have not

89. Mr. Peacock intentionally entered onto the Subject Property and destroyed Petitioner's berm to allegedly mitigate flooding on Garrett Road, yet he took no action to mitigate flooding on the Garrett

> Road caused by the discharge of water from the Willoughby Parcel.
>
> 90. Petitioner "has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment." *Chabad Chayil, Inc.* at *7 quoting *PBT Real Est., LLC v. Town of Palm Beach*, 988 F.3d 1274, 1285 (11th Cir. 2021).
>
> 91. Mr. Peacock's actions are punitive and unprecedented when compared to his actions with respect to others similarly situated who are not being treated in the same manner, namely the Willoughbys.
>
> 92. Mr. Peacock, under color of state law, acted in an arbitrary and capricious manner by depriving Petitioner of his property rights without equal protection of the law in violation of Petitioner's rights under the Equal Protection Clause."

The Second Amended Complaint, paragraphs 88 thru 91, clearly state the similarly situated comparator - the way the Petitioner was treated relative to Willoughby to cause flooding on Garrett Road - for the Equal Protection claim.

Respondent Jackson County, having acquiesced to Respondent Peacock, Respondent Peacock's actions became official actions of Respondent Jackson County.

(g) Statement of the Case

The Petitioner, Robert M. Rogers, respectfully petitions this court for a *writ of certiorari* to review the application of the 1923 Florda Supreme Court embezzlement Case of *Kirkland v. State*, 86 Fla. 64, 97, So. 502 (Fla. 1923) to the instant case concerning the Petitioner's Federal Complaint, of denying the Petitioner Due Process, against Respondents Jackson County and James D. Peacock. The Petitioner avers that a hearing was denied by Respondent Peacock (See *Simpson v. Brown County,* No.16-2234 (7th Cir. 2017)) as an authority acquiesced by Respondent Jackson County.

The District and Appeals Courts assert that because Respondent Peacock was not authorized by Jackson County Board of County Commissioners, invoking *Kirkland v. State*, (86 Fla. 64, 97, So. 502 (Fla. 1923)), the County cannot be responsible for Respondent Peacock's actions. The Petitioner, Robert M. Rogers, avers that the context of the *Kirkland* case matters and is not applicable to the instant case for the reasons set out below.

(g-1) Kirkland Case Law in District and Appeal Court Orders

The District Court references the 1923 Case of Jackson County Commissioner John D. Kirkland where the Court states (Docket #47, page 10).

> "Under Florida law, the Board of County Commissioners may only act as a whole, and the actions of individual commissioners, without Board approval, does not bind the county. *Kirkland v.*

> *State*, 97 So. 502, 508 (Fla. 1923). Thus, absent Board approval, Commissioner Peacock's actions could not be considered "authorized.""

This wording is a paraphrase of the 1983 Florida Attorney General Opinion (*AGO 83-100*), which does not include the phrase "Under Florida law" and the reference to County property is missing.

As stated in the 1983 Attorney General Opinion (AGO 83-100):

> "Generally, a county commission must act as a body and an individual commissioner cannot, unless authorized by law, make official decisions or bind the county" *Kirkland v. State*, 97 So. 502, 508 (Fla. 1923) wherein the Florida Supreme Court stated: "*The people, for whom the county commissioners as a board are vested with the power to manage and control the property of the county, have the right to the combined information, experience, and judgment of all the members of the board, or a majority of them, in legal session, when a majority of them, and at no other time, can act with any binding effect upon the county.*"" **emphasis added**

And, in the 11th Circuit Court of Appeals its reference is closer to the actual *Kirkland* Case summary but fails to relate "property" to the instant Case.

> "Under Florida law, a county's board of commissioners has the power to maintain the county's property collectively, not the individual

commissioners. *Kirkland v. State,* 97 So. 502, 508 (Fla. 1923) "**emphasis added**

In the context of the Case of embezzlement against Commissioner Kirkland, County property is converted into money to the benefit to the office holder.

(g-2) <u>Kirkland v. State Case Summary</u>

"John D. Kirkland was convicted of the crime of embezzlement upon three counts of an indictment containing five counts. Each count charged that he was a County Commissioner for Jackson County and that he converted to his own use money which came into his hands and possession by virtue of his office as County Commissioner."

"Board of commissioners may make orders concerning care of property only in legal meeting. The board of county commissioners in legal meeting only, and at no other time, is vested with the power to make orders concerning the care of the county property. The members individually, when not in lawful meeting, have no power as county commissioners."

In 1958 Florida Supreme Court Case of *State v. Bruno,* (104 So. 2d 588, 107 So. 9 (1958)), a criminal offense is alleged where Louis A. Bruno was accused of grand larceny while serving as a Miami City Council member. As in *Kirkland*, there were preliminary hearings concerning a determination in what manner the alleged offense was connected to the

discharge of his official duties. (see also *Wilson v. State,* 103 Fla. 262 137 So. 225, (1931)).

(g-3) Kirkland v. State's Application in Civil Matters (*Padgett*)

The 1966 case heard in Florida's 1st District Court of Appeals of *Padgett v. Bay County*, (187 So. 2d 410, (Fla. 1st Dist. Ct. App., 1966)) has clarified the role of a Board of County Commissioners acquiesce to an individual member and the extent to which *Kirkland v. State* was applied to the *Padgett* Case. *Kirkland v. State* was a case of embezzlement when the then Jackson County Commissioner John D. Kirkland personally benefitted because of his position on the Board of County Commissioners.

In *Padgett v. Bay County* brought by Bay County taxpayers as an abuse of discretion, "there was no record of any action taken by the Board" and that the Board "acquiesced in or at least by tacit agreement let each member of the Board determine the work to be done in the member's district". Opining that "[t]his is to some extent a common practice in most counties." Referring to *F.S. 125.01*, "[n]o particular method of accomplishing the purposes of this Chapter are set for except that the Commissioners at any 'legal meeting' may do these things," and "the Board's system of conducting its business was 'rather loose system' ". "The cited case of *Kirkland v. State, 86 Fla. 64, 97, So. 502 (1923)* has no application to the case at bar.'" "In the case before us, the Commissioner in whose district the questioned work was done, did not derive any monetary or other compensation thereof."

This case was decided, not on the basis that the county cannot be held responsible for the actions of a single commissioner, but on the basis that the commissioner involved did not derive any compensation even though the system of governance by the Board was loose. The Florida 1st District Court of Appeals recognized context was a significant deciding factor (see *Fischer v. United States,* No. 23–5572, (2024)).

(g-4) <u>Jackson County Acquiescence to Respondent Peacock</u>

At the Petitioner's State Court Injunctive Relief Hearing on June 19, 2020, chronicled by a Transcript, Respondent Peacock individually and as a County Commissioner, was represented by the County Attorneys (see Tr. June 19, 2020, Docket #34-4, Transcript, page 2):

> **"ON BEHALF OF THE DEFENDANTS:**
> **Warner Law Firm, P.A.**
> **519 Grace Avenue**
> **Panama City, FL 32401**
> **850-784-7772**
> **BY: WILLIAM G. WARNER, ESQUIRE**
> **billwarner@warnerlaw.us**
> **ERIC A. KREBS, ESQUIRE**
> **erickrebs@warnerlaw.us"**

Respondent Peacock testified that no formal authorization was required since he was a county commissioner (Docket #34-4, page 87-88).

"21· · · · Q· · Mr. Peacock, when you guys were out there –
22· ·when I say "you guys," you and Mr. Gonzalez, on
23· ·December 30th, did you guys have any formal
24· ·authorization from the Jackson County Commission to be
25· ·out there and to do any work whatsoever on Mr. Rogers'
·1· ·berm?
·2· · · · A· · We did not have any formal authorization.
·3· ·It's not required.· As a commissioner, there's exigent
·4· ·circumstances, which I deemed that we needed to get
·5· ·the water off the road.· We did not have to go before
·6· ·the commission to correct a safety hazard.
·7· · · · Q· · So you're saying that you deemed it
·8· ·necessary; is that right?
·9· · · · A· · That is correct.· And I am a commissioner." **emphasis added**

Contrary to Respondent Peacock's assertions, evidence shows that the roadway was passable that his actions were not a Hodal-type emergency situation that warranted summary action (See *Hodal v. Virginia Surface Mining,* 452 U.S. 264 (1981)).

(g-5) <u>Respondent Peacock's consumption of County resources:</u>

1) Respondent Peacock, after discovering the Petitioner's berm under construction, directed County surveyor Southeastern Surveying and Mapping Corp., to conduct a topographic survey which was completed and dated August 29, 2019, (Docket #34-2) This survey was conducted after the roadway had been changed in elevation and its shape. Despite a duty to disclose initiated when it was commissioned, (*Striker v. Graham Pest,* 179 A.D.2d 984, N.Y. App. Div. (1992)), this survey was withheld from the June 19, 2020, hearing. The survey found that the Petitioner's berm height was less than 3 feet and had a potential for holding a few inches of water. No encroachment was found in this survey.

From transcript of the June 19, 2020, hearing, (Docket #34-4, page 69, lines 10:25), Respondent Peacock testified as follows:

"10 Q. So your testimony is that portions of the
11 berm encroached onto Garrett Road?
12 A. Yes, sir. From my observations, I would say
13 there are places it goes from two feet to three feet,
14 four feet up on the road.
15 Q. After making those observations, did you
16 ever make any efforts to communicate with Mr. Rogers?

17 · · · · A · · Yes, sir, I did. · The first thing I did was
18 · · requested a survey, and then I happened to be in the
19 · · area and saw Mr. Rogers in the yard. · I did not stop
20 · · and talk to him, but I left my business card a day
21 · · later. · And he called me back, called me up. · And I
22 · · explained to him that I wanted to meet with him and
23 · · see if we could resolve the issue of his berm
24 · · encroaching upon the roadway. · And I asked him to call
25 · · me when he came to town, and I never heard back from ..".

Respondent Peacock, when asked why, if he knew about the Petitioner's berm, why did it take 4 months to act (Docket #34-4, page 85, lines 19:25 and page 86, lines 1:15,), his reply was that he wanted to get a survey:

"5 · · · · Q · · Understood. · The survey you just referenced,
6 · · did the County actually end up getting a survey?
7 · · · · A · · Yes, sir, we did.
8 · · · · Q · · Is it the same one that Mr. Rogers has
9 · · introduced in evidence today?
10 · · · · A · · No, sir.

11· · · · Q· · It's a different one that the County has not

12· ·introduced into evidence?

13· · · · A· · It has not been introduced into evidence."

The Respondents had a duty to disclose this material evidence at this hearing. That duty began when the survey was commissioned in August 2019. (*Striker v. Graham Pest Control Company Inc.*, 179 A.D.2d 984, N.Y. App. Div. (1992)). The existence of this survey was not revealed until June 19, 2020, State Court hearing. Testimony at that hearing was unconstrained by its absence. Only after a September 2020 subpoena was its contents and significance revealed and showed a berm height of less than 3 feet, a potential water depth of inches, and no encroachment onto the road in contrast to the Respondents' testimony.

The District Court failed to notify the parties of its intention to Judicially Notice the Transcript of the June hearing (Fed. R. Civ. P. 201 (b) (2)). Had the parties been given notice, then the Survey commissioned by the Respondent's, already incorporated into the Record as attachments to the Petitioner's second amended complaint would have been brought to this Court's attention (Fed. R. Civ. P. 201 (e) & 5 U.S.C. § 556 (e)).

Respondent Peacock obligated the County to pay the cost of this survey and he alone determined that this document would be held back from the Court.

2) At this hearing, Respondent Peacock testified (Docket #34-4, page 87):

> **"10 · · · Q · · Mr. Peacock, when you were out there with**
> **11 · Mr. Gonzalez, who was the supervisor between the two**
> **12 · of you?**
> 13 · · · A · · He is the district supervisor. · However, I
> 14 · am the county commissioner responsible for that
> 15 · district.
> **16 · · · Q · · So in terms of chain of authority, are you**
> **17 · higher, so to speak, ranked than Mr. Gonzalez?**
> 18 · · · A · · I would say I'm probably higher up the food
> 19 · chain than he is, yes, but he also has a boss that is
> 20 · in the chain also."

leaving County Employees unsupervised (*City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989)). In this testimony, Respondent Peacock states that he is responsible for District 5, not that he represents District 5 while seated on the Board of County Commissioners.

Respondent Peacock's statements show that the County had acquiesced to him. Respondent Peacock was directing the action, and the County

employee Gonzalez and one or more employees were under his direction and left without supervision.

Despite Respondent Peacock's assertion that exigent circumstances existed, the roadway was passable as evidenced by the Petitioner's security video (Docket #34-4, page 31, lines 6:25, page 32, lines 1:12), by the Petitioner's testimony that the berm held no more water than other occasions before the Petitioner's berm was constructed (Docket #34-4, page 50, lines 10:21), and from the recently available National Oceanic and Atmospheric Administration's LiDAR terrain elevation data.

3) Respondent Peacock testified in the June 19, 2020, hearing concerning curtailing discharge from the Willoughby property (Docket #34-4, page 90, lines 11:25 & page 91, lines 1:5):

> **"11 Q. Mr. Peacock, is it possible for the County**
> **12 to install ditches or culverts that would direct the**
> **13 water east or west of the Willoughby parcel?**
> 14 A. It is possible.
> **15 Q. Is it also possible for the County to place**
> **16 either a dam or a berm on the northern side of Garrett**
> **17 Road in order to keep the road free of the water?**
> 18 A. I don't think we would place a berm there or

19 · ·dam because it's a natural drainage area, natural flow
20 · ·of water.
21· · · · Q· · That wasn't my question.
22 · · · · A · · We can't go around the county doing all of
23 · ·these --
24· · · · Q· · Sir, my question was only whether it was
25· ·possible.
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·1 · · · · A · · Well, are you implying can we, can we
·2 · ·physically do it?
·3· · · · Q· · Yes, sir.
·4 · · · · A · · Sure. · You can pile dirt anywhere, but it
·5 · ·won't happen**". emphasis added**

Respondent Peacock testified as the one in authority to make changes to the roadway, but become evasive and irrational, avoiding a solution (*Village of Willowbrook v Olech*, 528 U.S. 562 (2000)).

Not only is the Willoughby discharge causing continuing but temporary damage to the Petitioner's property and the livelihood of the lessor, but is causing repeated damage to the county road, for which the Board of County Commissioners are responsible *(F.S. 336.02 (1) (a))*.

4) Respondent Peacock stated at a Board of County Commissioners meeting and chronicled by the Jackson Count Floridan newspaper (*Jackson County*

Floridan, June 12, 2021) that he needed the District Maintenance Supervisor to "get things done". Making this statement in the presence of fellow commissioners and in an open County Board meeting that he utilized County employees as resources, is further evidence that the Respondent Jackson County Acquiesced to Respondent Peacock in matters of the County Roads, and being published in the local newspaper, became local knowledge.

(h) Reason for the Allowance of the Writ

This Case is a case of private property protection against government actors.

(h-1) Factual Background

The Petitioner is the fee simple owner of real property located in Jackson County Florida as described by the property appraiser ID 07-6N-09-0000-0010-0000[3]:

> Parcel C: All that part of the Northeast Quarter of Northeast Quarter lying West of State Highway 71; and all that part of the Northwest Quarter of Northeast Quarter lying South and East of that certain county graded road known as Garrett Road, in Section 7, Township 6 North, Range 9 West.

The Petitioner's property is similarly situated to the Willoughby property with an intervening dirt

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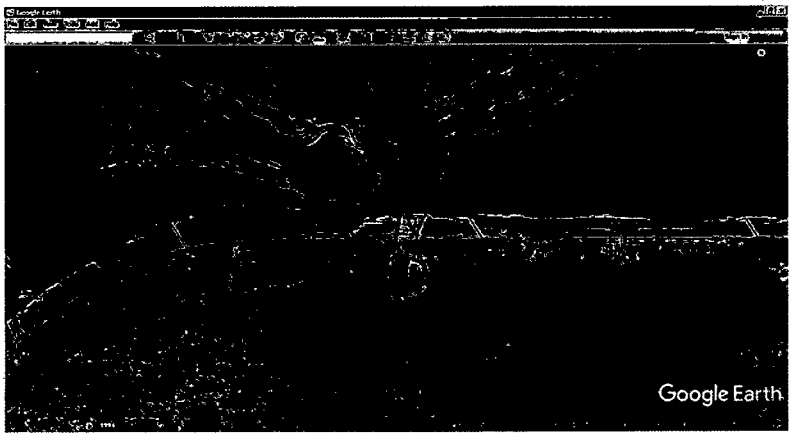
[3] Undivided half interest 1998 warranty deed from his parents, recorded in Jackson County Official Records Order Book 691 Page 457 & undivided half interest 2010 warranty deed from his brother recorded in Order Book 1281 page 243.

road that lies between the two properties. As seen in this Google Earth image (State Docket Petitioner Ex. 5) & (Docket #34-4, page 50, lines 18:21, below it is subject to frequent flooding. A January 2019 storm caused discharge from the Willoughby property to flow into and across this County dirt road;, This discharge caused water to pond on the road and to severely erode the road and to wash onto the Petitioners' property carrying sediment and chemicals from the Willoughby property.



The County repaired this roadway from the January 2019 storm but without the requisite permit nor permit exemption from the Northwest Water Management District (*F.S. 403.813 (1) (t)* and *Fla. Admin. Code: 62-330.051 (1) & (t)*). The County's repair elevated the road by 1 ft or more, filled-in ditches on the north side of the road, and reshaped the road to cause more discharge to enter onto the Petitioner's property (see *Town of Miami Springs v. Lawrence*, 102 So.2d 143 (1958)). The County's repair did not mitigate the Willoughby source of the continuing roadway damage and suggests County abandonment (see *Jordan v. St. Johns County*).

Absent a response to the Petitioner's July 10, 2019, letter to the Jackson County Road Department (Docket #34-4, page 21, lines 5:8), and being cognizant of Florida State Law, (*F.S. 373.406*), the Petitioner constructed a lawful protective berm in late July/early August 2019 (Docket #34-4, page 51, lines 21:25; page 52; and page 53, lines 1:6) (*F.S. 70.001-Florida Bill of Rights (see also F.S. 776.031)*). This protective berm was constructed based on sound engineering principles to impede and redirect the Willoughby discharge, while slowing the water flow speed to curtail erosion, but also allowing vehicle passage without hindrance.

On December 27, 2019, Respondent Peacock was seen in the Petitioner's security camera video leaving something at the Petitioner's home in Jackson County. Without notice, on December 30, 2019, these same security cameras detected a county truck and trailered backhoe entering the Petitioner's property with Respondent Peacock. After contacting the County Office, Respondent Peaccock was reached by phone and told to stop his action against the Petitioner's property, but without success.

Respondent Peacock's actions destroyed the Petitioner's protective berm causing property damage and financial loss from intermittent flooding. As the Petitioner testified at the June 19, 2020, hearing, the Petitioner's property is used for agricultural purposes:

Q· · And I think you testified before, but I want
to make sure we have this on the record.· Your

23· ·property, I think you said that the portion of the
24· ·property immediately near this roadway is about
25· ·43 acres; is that right?
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·1· · · · A· ·That was the parcel that my father purchased
·2· ·from Mr. Garrett.· There's another parcel south of
·3· ·there my father purchased from someone else.
·4· · · · Q· · So this was approximately 77 acres when
·5· ·accumulated?
·6· · · · A· ·That's correct.
·7· · · · Q· · And about 75 of those acres are used for
·8· ·agricultural purposes?
·9· · · · A· ·That's correct.
10· · · · Q· · And I believe you testified that the person
11· ·who was farming the property draws water from the
12· ·aquifer to irrigate his crops, correct?
13· · · · A· ·That's correct.

(Docket #34-4, page 40, lines 21:25 and page 41, lines 1:13).

On December 31, 2019, the Petitioner traveled from his home in Alachua County to examine damage to the berm and discovered Respondent Peacock's business card lodged in the door of the Petitioner's Jackson County home stating "call me".

Newly available evidence from the National Oceanic and Atmospheric Administration (NOAA) and U.S. Geological Survey (USGS) 2020 Hurricane Michael LiDAR terrain elevation data became available on the NOAA website or about February 8, 2024, represents data collected in February 2020, and is representative of the berm features that existed on December 30, 2019.

The USGS webpage provides spot elevation evidence to refute the Respondent's misrepresentations of the Petitioner's berm features, including its height above the road, depth of water held, and encroachment onto the roadway. This evidence shows that the berm height is less than 3 ft, water depth, at its deepest, was approximately 6 inches and there was no encroachment onto the roadway. This evidence also shows the roadway's elevation increase, and its shaping and contouring to drain into the Petitioner's property.

There were no exigent circumstances that required draining the water from the roadway (District Court order page 3, lines 9:11) and the water held by the Petitioner's berm was no different from past flooded occasions without the Petitioner's berm (Docket #34-4, page 50, lines 18:21, [A-44]). There was ample opportunity for a pre-deprivation hearing but, tis was denied with Respondent Peacock's, acting with authority acquiesced by Respondent Jackson County, preemptive action against the Petitioner's property causing property damage and financial loss with repeated disruption of farming activities due to the frequent flooding.

Respondent Peacock returned repeatedly to act against the Petitioner's property. A 2 ft strip was removed from the berm, and on August 26, 2020, Respondent Peacock removed survey stakes placed by Snelgrove Surveying that marked the property boundary before the berm material was removed. These repeated actions by Respondent Peacock can only be interpreted as intentional hostile acts against the Petitioner that will continue to deny the use and enjoyment of this property.

With the Petitioner's berm breached, discharge continues from the Willoughby property with each significant rainfall event, creating a temporary injury (*Baker v. Hickman*, 969 So. 2d 441) to the Petitioner and the lessee as seen in the Petitioner's Second Amended Complaint (Docket #34, page 26), the drone image below. This recuring flooding disrupts the farming operations leading to the Petitioner's and lessee's financial loss.

(h-2) <u>11th Circuit versus other Circuits Post-Deprivation</u>

1) <u>Pre-Deprivation Opportunity</u>.

The "adequate" post-deprivation remedy as suggested by the District Court presumes that there was no opportunity for a pre-deprivation hearing.

In Testimony during the June 2020 hearing and other evidence shows that on at least three occasions, Respondent Peacock had an opportunity to address this matter with the Respondent but chose not to.

During the berm's construction in late July and early August, Respondent Peacock had knowledge of the Petitioner's berm. Respondent Peacock did not take any action to address his concerns nor to avoid damage to the Petitioner's property. As testified (Docket #34-4, page 82:83, lines 24:18)

Q. Mr. Peacock, just a moment ago you were testifying that you had a conversation with someone

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out there originally back when the berm was being constructed; is that right?

A. That's true.

Q. During those conversations, did you tell that person or anyone else affiliated with that construction company that the berm or the area that the berm was in was, quote, unquote, yours?

A. I did not tell anyone that it was mine. I might have said it is my district. The gentleman who was actually doing the work was a former county commissioner from, I believe, Liberty County. I don't remember his name, didn't get his card. I just told him, Don't put your dirt on our road and don't throw your water on our road.

Q. I understand. Earlier Mr. Rogers testified that the berm was completed in or around August of

17· ·2019.· Does that sound about right?
18· · · ·A· ·I'll go along with that.· I don't know.

The State Court hearing's Transcript, Judicially Noticed by the District Court (Docket #34-4, page 69, lines 10:25), shows that Respondent Peacock had an opportunity to address this matter with the Petitioner months before his actions against the Petitioner's property:

10 Q· · So your testimony is that portions of the
11· ·berm encroached onto Garrett Road?
12· · · ·A· ·Yes, sir.· From my observations, I would say
13· ·there are places it goes from two feet to three feet,
14· ·four feet up on the road.
15· · · ·Q· · After making those observations, did you
16· ·ever make any efforts to communicate with Mr. Rogers?
17· · · ·A· ·Yes, sir, I did.· The first thing I did was
18· ·requested a survey, and then I happened to be in the
19· ·area and saw Mr. Rogers in the yard.· I did not stop
20· ·and talk to him, but I left my business card a day
21· ·later.· And he called me back, called me up.· And I

22 · ·explained to him that I wanted to meet with him and
23 · ·see if we could resolve the issue of his berm
24 · ·encroaching upon the roadway. · And I asked him to call
25 · ·me when he came to town, and I never heard back from

The Petitioner's security camera shows Respondent Peacock entering the Petitioner's property on September 2, 2019, just a few days after the Southeastern Surveying and Mapping Corp's topographic. survey map was completed and dated August 29, 2019. Then, again on December 27, 2019, Respondent Peacock entered the Petitioner's property and appeared to leave something in the Petitioner's door. On December 31, 2019, after traveling from his home in Alachua County to his home in Jackson County, the Petitioner discovered Respondent Peacock's business card with the annotation "call me".

Having had the opportunity to pause actions before damaging the Petitioner's property, Respondent Peacock chose to deny the Petitioner a pre-deprivation hearing. The interchange between the Petitioner and Respondent on the day of the Petitioner's berm destruction chronicled in the Petitioner's testimony during the June 2020 hearing. (Docket #34-4, page 48, lines (3:7)

·3· · · · Q· · And did he indicate to you that he was going
·4· ·to have to relieve that impoundment by breaching the

5 berm?

6 A He stated he was going to do what he had to

7 do and I should do what I have to do.
(emphasis added)

2) Post-Deprivation Remedy

The District Court's "adequate" post-deprivation remedy does not redress the Petitioner's property loss and financial injury. Quoting from *Simpson v Brown County*, "See *Easter House,* 910, F.2d at 1406 (7th Cir. 1989) (state remedy cannot be "meaningless or nonexistent")"... "Meaningful post-deprivation remedy are characterized by promptness and by the ability to restore the claimant to possession" The state.

In the Seventh Circuit Case of *Simpson v. Brown County*, a similar set of circumstances present themselves.

> "Simpson filed suit under 42 U.S.C. 1983. The district court dismissed, reasoning that post-deprivation remedies, such as common-law judicial review, satisfied the due process requirement and that Simpson had not availed himself of such remedies. The Seventh Circuit reversed, finding that Simpson plausibly alleged that he was denied the pre-deprivation notice and hearing he was due and that even if the County had some basis for summary action, it has not shown there is an adequate state law post-deprivation remedy."

> "reasoning underlying *Pro's Sports Bar*—that a remedy cannot be deemed "adequate" if the plaintiff's injury is financial and the remedy offers no compensation at all—comports with the broader principle that due process "is not a technical conception with a fixed content" but is instead "flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334 (citations omitted)."

> "The requirement that an adequate post-deprivation remedy for an economic injury must provide some form of compensation parallels the requirement of just compensation under the Takings Clause of the Fifth Amendment. "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner ... . Thus, compensation is mandated when [property] is taken and the government occupies the property for its own purposes, even though that use is temporary." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) (citations omitted); see also *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987)"

In the present case, there is a plausible question whether there is an adequate post-deprivation remedy available to the Petitioner given that the Respondent parties are no longer joined.

Clearly from the evidence, there was an opportunity to provide the Petitioner with a pre-

deprivation hearing before damage occurred. The Petitioner has the expectation of Due Process and the right to Protect his property as outlined in the Florida Property Owners Bill of Rights (F.S. 70.001).

(h-3) Conclusion

The importance of this petition is to foster accountability for "loose" governments who wish to avoid responsibility for individual members actions after having acquiesced to them.

Obvious from the course of this Case, Counties may choose to distance themselves after-the-fact by claiming that an employee or Commissioner acted without the knowledge of nor consent by the Board of County Commissioners to avoid accountability. In State Court, Respondent Peacock was represented by County Attorneys with arguments to excuse his actions because he was a County Commissioner. Now, in Federal Court, a conversion has taken place, the County claims that Respondent Peacock's actions were not a part of a defined County policy adopting the narrative of *Kirkland v. State* in its argument.

The "loose" form of County governance, as described in the Florida 1st District Court of Appeals in *Padgett v. Bay County* case, is ripe for abuse by loosely governed Counties.

Finally, the 11th Circuit Court of Appeals, in their Opinion for this Case, demands that the Appellant give the legal theory in its appeal (see last paragraph page 4a). However, quoting from *Simpson v Brown County*; "See *Johnson v. City of Shelby*, 574

U.S. —, 135 S. Ct. 346, 346 (2014) ("Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief'; they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted.") (citation omitted); *Avila v. CitiMortgage, Inc.*, 801 F.3d 777, 783 (7th Cir. 2015) ("plaintiffs are not required to plead specific legal theories"), citing *King v. Kramer*, 763 F.3d 635, 642 (7th Cir. 2014)." **(emphasis added)**

The Petitioner respectively requests that The Supreme Court of the United States GRANT this Petition for a *writ of certiorari.*

Robert M. Rogers, PhD
pro se
3705 N.W. 24th Place
Gainesville, FL 32605
rmrogerscourt@gmail.com