

IN THE SUPREME COURT OF THE STATE OF FLORIDA  
Case No. SC09-2190

COLLIER COUNTY BOARD OF COUNTY  
COMMISSIONERS,

Petitioner,

Second District Case No. 2D07-  
4549

vs.

DWIGHT E. BROCK, CLERK OF THE  
CIRCUIT COURT OF COLLIER COUNTY,  
FLORIDA,

L.T. Case No. 04-941-CA  
Consolidated with  
Case No. 05-953-CA and  
Case No. 05-1506-CA

Respondent.

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**RESPONDENT CLERK'S OPPOSITION TO PETITIONER'S MOTION  
TO REVIEW ORDER DENYING MOTION TO STAY MANDATE**

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Respondent, Dwight E. Brock, Clerk of the Circuit Court of Collier County, Florida opposes Petitioner, Board of County Commissioners of Collier County's Motion to Review Order Denying Motion to Stay Mandate and in support states:

### **Introduction**

#### **A. The Dispute.**

This case, far from the County's characterization, makes no change to well-established Florida law, does not grant the Clerk new and unlimited powers, and does not impinge on the County's authority. On the contrary, this case started with the County's attempt to limit the Clerk's historic and salutary independent audit functions.

The Clerk was not attempting to, and the Second District Court of Appeal did not, expand on his constitutional and statutory roles of County auditor, custodian of County funds, and pre-auditor of County warrants for payment. Rather, this dispute began when the Clerk discovered a County bank account that was previously undisclosed to the Clerk, but which had existed for years. Indeed, after the case was filed, the Clerk discovered some 10 separate off-books accounts. The accounts had various characteristics of County accounts including County employees as signatories, use of the County's taxpayer identification number, and the use of County building addresses as the address given the banks for the accounts. Further, checks made payable to various County divisions were deposited into these accounts. Funds in

these accounts were not recorded in the County's financial system, and were spent without either County budget authority or the Clerk's knowledge or pre-audit. Indeed, one of the officials who was a signatory to one of the accounts entered a plea of no contest to a criminal offense regarding the account and invoked his right to remain silent to nearly every question propounded by the Clerk at a deposition.

When the Clerk discovered these accounts he attempted to carry out his responsibility as County auditor, custodian, and pre-auditor of County warrants sought to review and inspect the accounts. The County blocked his every attempt, insisting he had no such authority.

**B. The Second District's Ruling.**

The Second District resolved the dispute between the Clerk and the County and addressed "the scope of the powers exercised by the Clerk acting in his capacity as county auditor and custodian of all county funds." *Brock v. Board of County Comm'r of Collier County*, 34 Fla. L. Weekly D 1920, 2009 WL 3012705, \*1 (Fla. 2d DCA Sept. 23, 2009). To resolve this dispute, the court engaged in the most fundamental judicial function - - statutory interpretation. The Second District ruled that the statutory and constitutional authority, which both sides agreed the Clerk had, carried with it reasonable power to fulfill those obligations. It is a well-established principle

of law that a “statutory grant of power or right carries with it by implication everything necessary to carry out the power or right and make it effectual and complete.” *Id. at* \*2 (citing *Deltona Corp. v. Fla. Pub. Serv. Comm’n*, 220 So. 2d 905, 907 (Fla. 1969)). *See also Coca Cola Co. v. State*, 406 So. 2d 1079, 1081-82 (Fla. 1981).

Dissatisfied with the Second District’s application of long-standing constitutional and statutory provisions, the County sought rehearing and certification to this Court. The Second District Court correctly denied both requests. The County then sought a stay of the Second District’s Mandate. That request was also denied and the Second District issued its mandate on December 22, 2009. Undaunted, the County, making many of the same arguments, is now seeking discretionary review by this Court and wishes to use that attempt to have this Court order the Second District to recall its mandate.

More specifically, the County contends that it is entitled to relief from the mandate because it is likely that this Court will both accept jurisdiction and reverse the Second District on the merits. The County also must show that it will suffer irreparable harm should this Court not recall the mandate. As discussed below, none of the County’s arguments has merit and the County’s motion should be denied.

### **Standard of Review**

To justify a stay of mandate, the Court examines four factors derived from the Committee Notes to FLORIDA RULE OF APPELLATE PROCEDURE 9.120. “These factors include (1) the likelihood that jurisdiction will be accepted by the supreme court, (2) the likelihood that the movant will prevail on the merits in the supreme court, (3) the likelihood of harm if the stay is not granted, and (4) the likelihood that the harm would be irreparable in the absence of the stay.” *State v. Miyasato*, 805 So. 2d 818, 825 (Fla. 2d DCA 2001). *Cf. State ex rel. Price v. McCord*, 380 So. 2d 1037, 1039 (Fla. 1980) (stay of judgment entered by trial court will remain in effect after disposition of appeal, but pending disposition of request for Supreme Court review only if the movant can show “that there is both a likelihood of success in the Supreme Court and irreparable harm by the denial of a stay pending review in that Court”). “The burden of persuasion in this context must be placed on the movant.” *Miyasato*, 805 So. 2d at 826, n.2.

This burden is not lightly satisfied because a stay of mandate should be issued only when it is “essential.” *See Oliveira v. State*, 765 So. 2d 90, 91 (Fla. 4<sup>th</sup> DCA 2000); *City of Miami v. Arostegui*, 616 So. 2d 1117, 1121, n.5 (Fla. 1<sup>st</sup> DCA 1993). *See also* FLORIDA RULE OF APPELLATE PROCEDURE 9.120, Committee Notes (“The advisory committee was of the view that the district courts should permit such stays only when essential.”). (The standard in criminal cases may be a little different, as in

*Miyasato*, 805 So. 2d at 826; where the state seeks stay of mandate in a criminal case and where there is no showing of any harm to the defendant, the balance to show that the stay is essential may not weigh so heavily against the state). As discussed below, the County has not provided any facts supporting, and cannot satisfy its burden on, any of the elements.

**The County Cannot Show a Likelihood  
That This Court Will Accept Jurisdiction**

The County seeks discretionary review in this Court on the basis that the Second District’s opinion (1) expressly affects a class of constitutional officers or (2) expressly and directly conflicts with this Court’s decision in *Alachua County v. Powers*, 351 So. 2d 32 (Fla. 1977). Neither basis has merit.

**This Case Does Not Expressly Affect Constitutional Officers**

The County believes that this Court has discretionary review jurisdiction over the Second District’s opinion as a decision that “expressly affect[s] a class of constitutional or state officers;” FLORIDA RULE OF APPELLATE PROCEDURE 9.030(a)(2)(A)(iii). As noted above, the only thing that the Second District explicitly did was to interpret long-standing constitutional and statutory provisions describing the duties of the Clerk. In this respect, it was engaging in the most fundamental of judicial functions: statutory interpretation. *See Costarell v. Florida Unemployment Appeals*

*Comm'n*, 916 So. 2d 778, 782, n.2 (Fla. 2005) (“The fact that interpreting the law is a uniquely judicial function has been firmly established since at least 1803 when Chief Justice Marshall explained: ‘It is emphatically the province and duty of the judicial department to say what the law is.’”) (*citing Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803)). The Second District applied well-known canons of statutory interpretation and did precisely that.

In *Spradley v. State*, 293 So. 2d 697, 701 (Fla. 1974), this Court held that a “decision which ‘affects a class of constitutional or state officers’ must be one which does more than simply modify or construe or add to the case law which comprises much of the substantive and procedural law of this state; such cases naturally affect all classes of constitutional or state officers in that members of these classes are bound by the law the same as any other citizen.” (Emphasis added). Thus, in *Spradley*, this Court held that a district court opinion analyzing a prosecuting attorney’s compliance with a criminal discovery rule did not invoke its discretionary review jurisdiction, even though it involved a class of state officers; *i.e.* prosecuting attorneys. *Id.*

Here, similarly, the Second District was presented with issues of statutory construction. *See, e.g., Brock*, 2009 WL 3012705 at \*2, \*3 (analyzing the Clerk’s authority under Florida Constitution Article 8, Section 1(d) and Article II, Section 5(c)

and Florida Statutes, Sections 28.12, 136.08, 136.06(1), 129.09, 11.45(1)(c), and 218.31(17)). The County - - since it disagrees with that Opinion - - has taken the position that the Opinion has modified or enlarged the Clerk's rights in performing his statutory obligations. This is not the case. The court below simply engaged in the most fundamental of judicial functions - - statutory interpretation - - and reversed unsupportable restrictions that the trial court had placed on the Clerk in the completion of his statutory duties.

The Clerk acknowledges that clerks and boards of county commissioners of other non-charter Florida counties may be interested and find guidance in the outcome of this case. But this interest alone does not make this case one that affects constitutional officers. If this were the case, then all matters involving county government or constitutional officers would be automatically certified for review to this Court.

In *Spradley*, this Court expressly rejected such a broad jurisdictional sweep. Indeed, it receded from an earlier opinion that had greatly expanded discretionary jurisdiction to review cases that might in some way involve constitutional or state officers. This Court found that such a broad interpretation was "inconsistent with the often-stated philosophy behind the formation of our District Courts of Appeal - that

these courts are to be courts of final appellate jurisdiction except in a limited number of specific situations enumerated in the Constitution.” *Spradley*, 293 So. 2d at 701 (*receding from Richardson v. State*, 246 So. 2d 771 (Fla. 1971)). “To vest this Court with certiorari jurisdiction, a decision must Directly and in some way, Exclusively affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers.” *Id.* (emphasized capitalization in original).

Here, the Second District did nothing more than apply constitutional provisions and statutes that define the role and duty of the Clerk. As noted above, a decision that does no more than construe existing state law does not implicate this Court’s discretionary jurisdiction, even though classes of constitutional or state officers must conform to the ruling because of the underlying statutory requirement. *Id.* On the contrary, *Spradley* recognized the key role of the district courts of appeal in writing opinions that provide guidance on what the law requires and acting, in the vast majority of cases, as the courts of last resort. *Id.* In this case, the Second District left the law unchanged and required no more of clerks or boards of county commissioners than what the constitution and statutes have required for decades. Accordingly, the Clerk respectfully submits that this Court is not likely to find that it has discretionary review jurisdiction under Rule 9.030(a)(2)(A)(iii).

**The Second District’s Opinion Does Not**

**Conflict with *Alachua County v. Powers***

To invoke this Court's discretionary "conflict" jurisdiction, a conflict between decisions must be express and direct. *See Dep't of Health & Rehab. Servs. v. Nat'l Adoption Counseling Serv., Inc.*, 498 So. 2d 888 (Fla. 1986) (holding that an inherent or implied conflict is not sufficient). The County's Motion should be denied because there is no conflict between the Second District's Opinion and *Alachua County v. Powers*.

Not only did the Second District not "express" any conflict with this Court's decision, but, on the contrary, it was actively attempting to adhere to the principles set out in *Alachua County* that recognized that the Clerk has a duty to determine the legality of expenditures:

The Clerk has the authority and responsibility to perform the auditing functions both as an arm of the board in auditing the records of constitutional officers and as a watchdog of the board in the case of pre-auditing accounts of the board in determining legality of expenditure.

*Alachua County*, 351 So. 2d at 37.

The Second District focused on that duty and held that the Clerk has the ability to conduct such "post payment audits" that are necessary to verify the legality of payments. Importantly, the court did not hold that the Clerk has the ability to conduct

"post audits" (which the Second District, reflecting updated statutory language, referred to as "financial audits") as contemplated by *Alachua County v. Powers*. See *Brock*, 2009 WL 3012705 at \*3 (noting that the Clerk's post payment audits are "distinct from financial audits" as defined by Florida Statutes). Rather, it recognized that examining payments that have been completed is part of the testing of internal controls - - - part of the pre-audit - - of payments yet to be made. *Id.* ("Verification of the legality of payments already made - a process which tests the soundness of existing internal controls - is directly related to ensuring that future payments are legal.").

Indeed, the pertinent issue in *Alachua County* involved the Clerk's authority to pre-audit County warrants for payment. *Alachua County*, 351 So. 2d at 37. The Second District found that the Clerk's "post-payment" audits were part of his pre-audit authority. This issue (the use of post-payment audits to fulfill the Clerk's undisputed pre-audit authority) was not even addressed in *Alachua County*. As this Court never discussed "post-payment" audits, there can be no conflict, much less an "express and direct" conflict. *Nat'l Adoption Counseling*, 498 So. 2d at 888. This Court in *Alachua County* did discuss the County's authority to have "post-audits" conducted, (*Alachua County*, 351 So. 2d at 37), but as noted above, the Second District specifically found that the Clerk's post-payment audits were not "post-audits." *Brock*, 2009 WL 3012705

at \*3 (referring to such audits as “financial audits”). Thus, the Clerk respectfully believes that this Court will not find that it has conflict jurisdiction either.

**The County Has Not Carried its Burden to Show  
It Will Likely Prevail on the Merits in this Court**

Contrary to the County’s argument, it is not merely sufficient for it to claim that it can show a likelihood of prevailing on the merits. Rather, as noted above, the burden is on the party seeking a stay of mandate to demonstrate each element, including a likelihood of prevailing before this Court. *Miyasato*, 805 So.2d at 826 n.2. Indeed, just as it does here, the County in a related case between these two parties sought discretionary review before this Court based on, among other grounds, a claim that the opinion expressly affected a class of constitutional officers (clerks and boards of county commissioners) and that the lower court’s ruling conflicted with *Alachua County*. This Court rejected both grounds and denied the County’s petition. *See Board of County Comm’r of Collier County v. Brock*, 18 So. 3d 1037, 2009 WL 2902301 (Fla. 2009). The County provides no reasons why it will have any more success with these same arguments than it had in its last visit before this Court.

**The County Cannot Carry Its  
Burden to Demonstrate Irreparable Harm**

As noted above, the County bears the burden of persuasion to establish each of the elements required for recall of the mandate. *See Miyasato*, 850 So. 2d at 826, n.2;

*Arostegui*, 616 So. 2d at 1121, n.5. Here, the irreparable harm claimed by the County is that the “Clerk would be able to take action that is beyond that permitted by law and do so with a significant and improper conflict of interest.” County’s Motion at 8 (citing *U.S. v. Arthur Young & Co.*, 465 U.S. 805 (1984)). The County’s argument lacks merit for several reasons.

First, the County’s purported concern that issuance of this Court’s mandate would permit the Clerk to take action beyond his authority is supported neither by history, the arguments of the Clerk, or the Second District’s Opinion. The Clerk has never claimed authority to conduct performance, operational, or financial audits of financial statements as defined in Florida Statutes, Sections 11.45(1)(c) and 218.31(17), has never conducted such audits, and did not argue to the Second District that he should be permitted to do so. Further, nothing in the Second District’s opinion purports to grant such authority to the Clerk. *See, e.g., Brock*, 2009 WL 3012705 at \*3 (“Such [post-payment] audits are distinct from the ‘financial audits’ of financial statements defined in sections 11.45(1)(c) and 218.31(17), Florida Statutes (2007).”). Rather, the Second District merely stated that as part of his undisputed “pre-audit” duty and authority, the Clerk may review internal controls by examining payments after they have been made. *Id.* These types of “post-payment” examinations (as part of the

Clerk's undisputed pre-audit authority) have historically been conducted by the Clerk. By issuing its mandate, the Second District merely maintained the historical status quo between the parties and does not constitute any type of irreparable harm to the County.

Second, the County's argument could just as easily apply to the Clerk. The County claims irreparable harm should the Clerk be permitted to take action beyond his authority. County's Motion at 8. If this is the case, then if this Court recalls the Second District's mandate, the Clerk would be subject to irreparable injury because he may be prevented from carrying out duties that the Second District has determined he is constitutionally and statutorily authorized and required to perform. Indeed, the Clerk is subject to potential personal criminal liability should he approve an unlawful warrant for payment. *See Fla. Stat. § 129.09*. Thus, even based on the County's own formulation of irreparable harm, the equities favor the Clerk as it is fundamentally unfair to subject him to possible criminal sanction for failing to properly do his job while depriving him of the necessary tools to do that job. At any rate, the equities would be, at most, equally balanced. Given that the County has the burden of persuasion, its motion must fail.

Third, the County's claim of a potential conflict misstates the law and clearly misunderstands the role of the Clerk. The County cites to *Arthur Young* for the

proposition that an auditor must maintain “total independence” from the client at all times. County’s Motion at 8 (*citing Arthur Young*, 465 U.S. 805). However, *Arthur Young* refers to an independent CPA acting as an external auditor in opining on the fair presentation of a client’s financial statements. *Arthur Young*, 465 U.S. at 817-18. Here, the Clerk is not, and does not purport to be, an outside CPA opining on the County’s financial statements. The County annually retains independent accounting firms for that function. Rather, the Clerk acts as the County’s internal auditor. Nothing in *Arthur Young* addresses the role of an internal auditor.

In any case, the Clerk maintains sufficient independence from the County to fulfill his constitutional and statutory roles. In performing his pre-audit duties, the Clerk is examining the internal controls and payment procedures used by the *County* to determine the legality of *County* payments. There is no dispute that the Clerk is an independently-elected constitutional officer that is not beholden to the County. Thus, the independence about which the County professes such concern clearly exists when an independent *Clerk* studies and examines the internal controls of the *County’s* payment systems. As noted above, it is also undisputed that external accountants annually perform a full financial audit of both the County’s and the Clerk’s books and records and yearly opine on the fair presentation of their financial statements.

Finally, the record in this case simply does not support the County's claims of irreparable harm. On the contrary, as the Second District found, the Clerk's examinations uncovered off-book bank accounts containing County funds, that were neither under the control of the Clerk, nor accounted for in the County's financial systems. *Brock*, 2009 WL 3012705 at \*1. *See also id.* at \*4 (Silberman, J. concurring in part and dissenting in part). Rather, it was only through the efforts of the Clerk that these funds were recovered to the benefit of the taxpayers of Collier County. *Id.* at \*1. *See also id.* at \*4, n.3 (Silberman, J. concurring in part, dissenting in part). Should this Court recall the Second District's mandate and the County interfere with the Clerk's performance of these types of examinations, the record in this case demonstrates that additional taxpayer funds may be secreted away in off-book accounts. Thus, rather than irreparable harm to the County, it is the taxpayers of Collier County, as well as the Clerk, who will suffer the injury. The County has failed to demonstrate irreparable injury and this Court should deny the County's Motion.

### **Conclusion**

For the reasons stated above, the County's Motion to Review Order Denying Motion to Stay Mandate should be denied.

Dated: January 12<sup>th</sup>, 2010

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was  
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**CERTIFICATE OF COMPLIANCE**

I certify that the foregoing complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2). The font is Times New Roman, 14-point.

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