

IN THE SUPREME COURT OF FLORIDA

COLLIER COUNTY BOARD OF
COUNTY COMMISSIONERS,

Petitioner,

v.

Case No.: SC09-2190
2nd DCA Case No.: 2D07-4549

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

Respondent.

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal
State of Florida, Second District

Christine Davis Graves
Florida Bar No. 569372
Carlton Fields, P.A.
215 S. Monroe Street, Suite 500
Tallahassee, FL 32301
Phone: (850) 224-1585
Fax: (850) 222-0398

Jacqueline Williams Hubbard
Litigation Section Chief
Florida Bar No. 468126
Office of the County Attorney
3301 East Tamiami Trail, 8th Floor
Naples, FL 34112
Phone: (239) 252-8400
Fax: (239) 774-0225

Attorneys for Petitioner Collier County Board of County Commissioners

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STATEMENT OF THE CASE AND FACTS

At issue in this proceeding is "the scope of the powers exercised by the [Respondent Clerk of Courts ("Clerk")] acting in his capacity as county auditor and custodian of all county funds." A. 2. Specifically, the court considered whether the authority granted to the Clerk under § 136.08, *Florida Statutes*, to "inspect and examine" bank accounts of the Petitioner Collier County Board of County Commissioners, ("Board"), authorizes the Clerk to conduct post-payment audits of any and all expenditures of the Board at any time. *Id.* The trial court made three rulings, two of which the Board requests this Court to review. First, the trial court ruled that the Clerk has no authority to investigate the status of county funds which were not in the actual custody of the Clerk. A. 3-4. The court reasoned that the Clerk can necessarily only be the custodian of those funds to which he has been given custody. *Id.* Moreover, there is no statutory or constitutional authority that would allow the Clerk to initiate an independent investigation or attempt to recover county funds absent instruction from the Board. *Id.*

Second, the trial court ruled that the Clerk is not authorized to conduct post-payment audits concerning county expenditures. *Id.* Again, the court found there was no statutory or constitutional authority to perform further audits beyond the time that the warrant for payment is signed, unless so directed by the Board. *Id.*

The Second District reversed these two rulings. A.5-6. It first held that the Clerk does have the authority to investigate county funds, even if those funds are not in the Clerk's possession. *Id.* The District Court further held that the Clerk is authorized to conduct “postpayment audits to verify the legality of payments that have been made are necessary to effectively carry out the Clerk’s duty to ensure that county funds are expended only as authorized by law. 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.” *Id.*

SUMMARY OF ARGUMENT

This Court has jurisdiction pursuant to article V, section 3(b)(3) of the *Florida Constitution* because it expressly affects two classes of constitutional officers in all 67 Florida counties -- the Florida boards of county commissioners and the Florida clerks of court. The decision expressly expands the scope of powers that the Clerk has and expressly limits the scope of powers that the Board has. The decision also conflicts with this Court's opinion in Alachua County v. Powers, 351 So. 2d 32 (Fla. 1977).

This ruling is one of first impression and uses a statutory public banking scheme under *Fla. Stat.* Chapter 136.01 *et seq.* to enlarge the power of county clerks to include post-audit power as to discretionary spending decisions made by

boards of county commissioners and does not appear to limit the types of audits that may be performed. No limits have been set as to this power, nor has “postpayment audit” been defined by the decision. The District Court justifies this decision, A-6, as being needed to “tests existing internal controls;” however, what is patently unclear is who’s internal controls need to be tested; the Board’s or the Clerk’s?

This Court should exercise its discretion to accept jurisdiction and review the Second District's decision because that decision significantly impacts boards of county commissioners and clerks across the state, conflicts with the historical constitutionally and statutorily authorized functions and powers of boards and clerks, and creates a considerable conflict of interest for clerks. Indeed, the danger of that conflict of interest has been emphasized by the U.S. Supreme Court.

ARGUMENT

I. THE DECISION ON REVIEW EXPRESSLY AND DIRECTLY AFFECTS TWO CLASSES OF CONSTITUTIONAL OFFICERS.

That the Second District's decision expressly and directly affects a class of constitutional officers is made clear from the first sentence in the court's opinion, when it stated: “[W]e consider questions concerning the scope of powers exercised by the Clerk acting in his capacity as county auditor and custodian of all county funds.” A. 2. In making this determination, the court necessarily also construed and limited the powers of the boards of county commissioners of all of Florida's 67

counties.

The Second District held that clerks may investigate circumstances in which public funds have been wrongfully withheld even though those accounts are not maintained by the County, and they may seek to obtain custody of the withheld funds. However, as the concurring and dissenting opinion found, the Legislature has not specifically granted county clerks any such power, and county clerks only have power specifically delineated by statute. A. 12-13 (Silberman J., concurring and dissenting in part) (citing Art. II, § 5(c), *Fla. Const.*). The scope of power established by law to statewide clerks and boards of county commissioners is directly impacted by the Second District's decision.

The same is true for the Second District's second holding that clerks are authorized to conduct post-payment audits. The court's broad holding appears to grant county clerks unlimited power to conduct post-payment audits of county boards at any time and for any reason. Does this power include the independent ability to audit how boards' departments, divisions, and projects perform? Does this power include the right to determine if a project is wisely selected or appropriately reviewed? Is this post audit power necessary for the pre-audit? What are its limits? This is contrary to how boards and clerks statewide historically have construed their powers. Moreover, the opinion does not explain how the powers purportedly authorized to clerks are to be carried out. For

example, the opinion did not define what exactly "post-payment audits" are. As the concurring and dissenting opinion pointed out: "The term 'postaudit' was defined in section 11.45(1)(c), *Florida Statutes* (1975), and is no longer in the statutes. Chapter 11 now contains the term 'financial audit.' *See* § 11.45(1)(c), *Fla. Stat.* (2007). The Clerk does not claim to have authority to do a financial audit because a financial audit is an external audit." A. 16 (Silberman, J., concurring and dissenting in part), (emphasis added).

The impact on clerks and boards statewide from the Second District's second holding is self evident. The Second District's decision thus expressly expanded the scope of powers granted to county clerks and limited the powers of boards of county commissioners.

As this Court has recognized, the "obvious purpose" of the jurisdictional provision at issue was to "permit this Court to review a decision which directly affects one state officer and in so doing similarly affects every other state officer in the same category." Fla. State Bd. of Health v. Lewis, 149 So. 2d 41, 43 (Fla. 1963). That is exactly what the Second District's decision does. This Court has previously accepted jurisdiction in cases involving the constitutional officers at issue here. *See, e.g.,* Cook v. City of Jacksonville, 823 So. 2d 86 (Fla. 2002) (reviewing decision affecting county clerks); Chief Judge of Eighth Judicial Circuit v. Bd. of County Comm'rs of Bradford County, 401 So. 2d 1330 (Fla. 1981)

(reviewing decision affected boards of county commissioners) City of Waldo v. Alachua County, 249 So. 2d 419 (Fla. 1971) (same).

Because of the significance of the issues at stake, this Court should exercise its discretion to review the Second District's decision.

II. THE DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH ALACHUA COUNTY V. POWERS, 351 So. 2d 32 (Fla. 1977).

In Alachua County v. Powers, 351 So. 2d 32 (Fla. 1977), this Court defined the scope of the fiscal duties of the clerks, when acting as clerks to boards of county commissions, explaining the clerks' role as (1) auditor, (2) accountant, and (3) custodian of county funds. This Court further set out the constitutional and statutory sources of the clerks' authority to act in all three capacities and interpreted those sources within the context of the boards of county commissioners' broad powers as the governing body of the county. *Id.* at 35.

This Court held that, while county clerks have responsibility to act as preauditor of county funds, boards of county commissioners have the right to audit their own funds and make such investigations as may be necessary before use of any public funds. *Id.* at 37. The clerks' power does not extend to post-audits, operational audits or performance audits. This Court explained that § 11.45(3)(a), *Florida Statutes*, “provides for post-audits by the auditor general” of the accounts and records of county agencies, including the board of county commissioners and the clerk, and that “[a]ll agencies have the power to have a performance audit or

post-audit of their accounts and records by an independent certified public accountant retained by them and paid from their public funds.” Thus, this Court held boards of county commissioners have "the authority to require a performance audit or post-audit by an independent accounting firm." *Id.*

The statutory limitations on clerks' auditing and investigative powers make sense in the overall scheme of county government. Boards of county commissioners have a legislative mandate to set county policy and govern the county for the benefit of the county's residents. *See* § 125.01, *Fla. Stat.* (2007). State Attorneys in each county have criminal investigative powers, *see* § 27.01, *et seq.*, *Fla. Stat.* An important aspect of carrying out that mandate is allocating county resources in ways that further the policies the board establishes. If the clerk had the unilateral authority to decide when, how and where to allocate the resources necessary to conduct internal audits and investigations, the clerk would be encroaching on the board's policy setting authority and usurping powers expressly granted the board by general law.

The Second District's holding in the decision under review is in direct conflict with Alachua County. There, the Second District held that the clerk does in fact have the authority to conduct post-audits. That holding expressly and directly conflicts with Alachua County. *See also* A. 15-17 (Silberman J. concurring and dissenting in part) (explaining the conflict between the Second

District's majority opinion and Alachua County).

III. THIS COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW THE SECOND DISTRICT'S DECISION BECAUSE IT SIGNIFICANTLY AFFECTS THE HISTORICAL ROLE OF COUNTY CLERKS AND BOARDS OF COUNTY COMMISSIONERS

The impact of the Second District's decision on statewide clerks and boards of county commissioners is significant, and this Court should therefore exercise its discretion to review that decision. It is vital that constitutional officers carry out those duties expressly authorized by law, as the constitution requires, nothing more and nothing less.

Florida law does not grant clerks a post audit power. Boards of county commissioners are the general administrative and fiscal officers of the county, not the clerk, and may employ auditors to audit the books, records, and accounts of county fee officers, such as the Collier County Clerk. Molwin Inv. Co. v. Turner, 123 Fla. 505, 508 (Fla. 1936). The clerk's auditing power, historically, has been to pre-audit claims against the county by third parties. *See* Ray v. Wilson, 10 So. 613 (Fla. 1892). The historical role of the clerk has not been to post-audit the discretionary spending acts of the board. No constitutional or statutory authority exists for the Second District's conclusion that the terms "inspection and examination," "internal audit," and "post-payment audit" can be used interchangeably. Further, clerks only have the powers and duties that are fixed by

law. Art. II, § 5(c), *Fla. Const.*

Moreover, expanding the power of a county clerk beyond that which is expressly granted by statute also creates a conflict of interest. For example, in Collier County, the Clerk is an integral part of County management and is in charge of the County Finance Department, as well as being the accountant and custodian of County funds. In performing an audit beyond pre-payment, the Clerk has a divided loyalty because as the party that approves the payment, he would be auditing himself. The law thus limits a clerk's authority to an internal review of his pre-audit function.

The United States Supreme Court has recognized the danger in this very outcome. In United States v. Arthur Young & Co., 465 U.S. 805 (1984), the U.S. Supreme Court emphasized the need for an auditor to maintain “total independence” from the client at all times and to act with complete fidelity to the public trust. *See also* Rule 10.551(2) of the *Rules of the Auditor General of the State of Florida, Local Governmental Entity Audits* (2009).

Finally, the Second District's decision calls into question the extent of the Home Rule Powers Act. § 125.01(1), *Florida Statutes*, grants Collier County “the power to carry on county government to the extent not inconsistent with general or special law. . . .” The Legislature has granted Collier County the authority to discipline those who fail to properly deposit public funds into an authorized

account (one of the principal allegations of the Clerk here). § 125.01(1)(b), *Fla. Stat.* The clerk has no such authority. The Second District's opinion, however, grants the clerk such authority.

For these reasons, the Second District's decision has a substantial impact on clerks and boards of county commissioners throughout the State, and this Court accordingly should exercise its discretion to review the decision.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise its discretion to accept jurisdiction to review the Second District's decision.

Respectfully Submitted,

Christine Davis Graves
Florida Bar No. 569372
Carlton Fields, P.A.
215 S. Monroe Street, Suite 500
Tallahassee, FL 32301
Phone: (850) 224-1585
Fax: (850) 222-0398

Jacqueline Williams Hubbard
Florida Bar No. 468126
Litigation Section Chief
Office of the County Attorney
3301 East Tamiami Trail, 8th Floor
Naples, FL 34112
Phone: (239) 252-8400
Fax: (239) 774-0225

Attorneys for Petitioner Collier County Board of County Commissioners

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of Petitioner's Jurisdictional Brief was delivered via facsimile and regular U.S. mail to the following on this ____ day of December, 2009:

David Ackerman, Esquire
Glory Ross, Esquire
Ackerman, Link & Sartory, P.A.
222 Lakeview Ave., Suite 1250
West Palm Beach, FL 33401
Facsimile: (561) 838-5305

Anthony Pires, Esquire
Steven Blount, Esquire
Woodward, Pires & Lombardo, P.A.
3200 North Tamiami Trail, Suite 200
Naples, FL 34103
Facsimile: (239) 649-7342

Jon L. Mills, Esquire
Timothy McLendon, Esquire
P.O. Box 2099
Gainesville, FL 32602
Facsimile: (352) 336-0270

Fred W. Baggett, Esquire
M. Hope Keating, Esquire
Greenberg Traurig, P.A.
101 East College Ave.
Tallahassee, FL 32301
Facsimile: (850) 681-0207

David Hallman, Esquire
President, Florida Association of County Attorneys, Inc.,
96135 Nassau Place, Suite 6
Yulee, Florida 32097-8635
Facsimile: (904) 321-2658

Herbert W. A. Thiele, Esquire
Florida Association of County Attorneys, Inc.
301 S. Monroe Street, Suite 202
Tallahassee, FL 32301
Facsimile: (850) 606-2501

Virginia Saunders Delegal, Esquire
General Counsel, Florida Association of Counties, Inc.
100 South Monroe Street
Tallahassee, FL 32301
Facsimile: (850) 488-7501

Theodore L. Tripp, Jr., Esq.
Hahn Loeser & Parks, P.A.
2532 East First Street
Fort Myers, FL 33901
Facsimile: (239) 337-6701

Walter T. Dartland, Esq.
2086 Wildridge Drive
Tallahassee, FL 32303-7360
Facsimile: (850) 562-2086

JACQUELINE WILLIAMS HUBBARD, ESQ.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this brief is 14-point Times New Roman double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

JACQUELINE WILLIAMS HUBBARD, ESQ.