

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.

RESPONDENT'S JURISDICTIONAL BRIEF

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

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TABLE OF CONTENTS

Table of Authorities ii

Introduction 1

Argument 2

 A. The Second District's Opinion Does Not Conflict 2
 With *Alachua County*

 B. This Case Does Not Expressly Affect Constitutional 6
 Officers

Conclusion 10

TABLE OF AUTHORITIES

Art. 8, § 1(d), Fla. Const.	6
Article II, § 5(c), Fla. Const.	6
Fla. Stat. § 11.45	4
Fla. Stat. § 28.12	6
Fla. Stat. § 129.09	6
Fla. Stat. § 136.06	6
Fla. Stat. § 136.08	6, 7
Fla. Stat. § 218.31	4
Fla. R. App. P. 9.030(a)(2)(A)(iii)	9
<i>Alachua County v. Powers</i>	2, 3, 4, 5, 6
351 So. 2d 32 (Fla. 1977)	
<i>Board of County Comm’r of Collier County v. Brock</i>	2
18 So. 3d 1037 (Fla. 2009)	
<i>Brock v. Board of County Comm’r of Collier County</i>	1, 3, 4, 6, 7
– So. 3d – , 2009 WL 3012705, *1 (Fla. 2d DCA Sept. 23, 2009)	
<i>Chief Judge of the Eighth Judicial Circuit v. Board of County</i>	10
<i>Comm’r of Bradford County</i> , 401 So. 2d 1330 (Fla. 1981)	
<i>City of Waldo v. Alachua County</i>	9
249 So. 2d 419 (Fla. 1971)	
<i>Coca-Cola Co. v. State</i>	1, 3
406 So. 2d 1079 (Fla. 1982)	

<i>Cook v. City of Jacksonville</i>	9
823 So. 2d 86 (Fla. 2002)	
<i>Costarell v. Florida Unemployment Appeals Comm'n</i>	7
916 So. 2d 778 (Fla. 2005)	
<i>Deltona Corp. v. Fla. Pub. Serv. Comm'n</i>	1, 3
220 So. 2d 905 (Fla. 1969)	
<i>Dep't of Health & Rehab. Servs. v. Nat'l Adoption Counseling Serv.</i>	2
498 So. 2d 888 (Fla. 1986)	
<i>Florida State Board of Health v. Lewis</i>	9
149 So. 2d 41 (Fla. 1963)	
<i>Marbury v. Madison</i>	7
5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803)	
<i>Richardson v. State</i>	9
246 So. 2d 771 (Fla. 1971)	
<i>Spradley v. State</i>	7, 8, 9, 10
293 So. 2d 697 (Fla. 1974)	
<i>W & F Ltd. v. Dunkle</i>	5
444 So. 2d 554 (Fla. 4 th DCA 1984)	

Respondent Dwight E. Brock, Clerk of the Circuit Court of Collier County, Florida, respectfully submits this jurisdictional brief. For the reasons discussed below, this Court should decline discretionary review of the opinion of the Second District Court of Appeal and deny the County's Petition.

I. INTRODUCTION

The Second District resolved a dispute between the Clerk and the County about “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*, – So. 3d – , 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. It 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 well-established 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. 1982) (expressly given powers include implied powers useful or necessary to accomplish the stated governmental purpose).

Dissatisfied with the Second District's application of long-standing constitutional and statutory provisions, the County seeks discretionary review in this Court on the basis that the Second District's opinion (A) expressly and directly conflicts with this Court's decision in *Alachua County v. Powers*, 351 So. 2d 32 (Fla. 1977) or (B) expressly affects a class of constitutional officers. Neither basis has merit. Indeed, in a recent case between these same two parties, the County sought to invoke this Court's discretionary review jurisdiction making, among others, the same arguments. This Court denied the County's petition. *See Board of County Comm'r of Collier County v. Brock*, 18 So. 3d 1037 (Fla. 2009). Similarly, for the reasons discussed below, this Court should again decline discretionary review and deny the County's petition.

II. ARGUMENT

A. The Second District's Opinion Does Not Conflict with *Alachua County*

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.*, 498 So. 2d 888 (Fla. 1986) (holding that an inherent or implied conflict is not sufficient). The County's Petition should be denied because

there is no conflict between this Court's decision in *Alachua County v. Powers* and the Second District's Opinion in this case.

Not only did the Second District not "express" any conflict with this Court's decision, but, on the contrary, it actively adhered 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 "postpayment audits" that are necessary to verify the legality of payments. 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. *See Brock*, 2009 WL 3012705 at *3 ("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."). As noted above, it is well established that the Clerk must possess the necessary implied power to fulfill his

statutory and constitutional role. *Coca-Cola Co.*, 406 So. 2d at 1081-82; *Deltona Corp.*, 220 So. 2d at 907.

Contrary to the list of horrors set out by the County, the Clerk has never argued that he had the power or the desire to conduct financial audits, performance audits, or audits to determine if a County project is wisely selected or appropriately reviewed. *See* County's Petition at 4. Similarly, 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).").

Similarly, the County appears to argue that the Second District has, contrary to *Alachua County*, limited the authority of boards of county commissioners to conduct their own audits and investigations. *See* County's Petition at 6-7. *See also id.* at 2 ("The [Second District's] decision expressly expands the scope of powers that the Clerk has and expressly limits the scope of powers that the Board has."). The County either misunderstands or misrepresents both the position of the Clerk and the Second District's Opinion. The Clerk has never argued that his constitutional and statutory roles as custodian of County funds and County auditor limit the ability of the Board to conduct its own inquiries into County operations even if they duplicate the Clerk's role.

Further, nothing in the Second District's Opinion purports to create any such limitations on the authority of the Board. The fact that in some circumstances the examinations of the Clerk and of the County may overlap does not create a conflict with *Alachua County*. On the contrary, this Court expressly held that a duplication of official duties was permissible under Florida law:

The name given a statutory officer is not material even if it is similar to a constitutional ex officio officer, if the authority conferred on the statutory officer does not conflict with the authority conferred by the Constitution on a constitutional officer. A mere duplication of official duties may not be a violation of the general intendments of the Constitution when statutory regulation of duties is authorized by the Constitution. If there is duplication of duties, no organic provision is violated.

Alachua County, 351 So. 2d at 37.

Nor, as the County contends, do the Clerk's post-payment audits create a conflict of interest because he would be "auditing himself." County's Petition at 9. The County clearly misunderstands the Clerk's pre-audit role. In that role, 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 concern, clearly exists when an independent *Clerk* studies and examines the internal controls of the *County's* payments

systems. It is precisely this type of check and balance provided by the Clerk that the statutes and constitution seek to promote. Indeed, the County's fierce resistance in this case, indicates a great desire to avoid, at all costs, the Clerk's independent ministrations. *Cf., W & F Ltd. v. Dunkle*, 444 So. 2d 554, 558 (Fla. 4th DCA 1984) ("The taxpayers look to the clerk's audits to shield them from the kinds of misuse of public funds that have recently surfaced in other Florida communities and in other jurisdictions. They fervently hope his ministrations will be an effective antidote to several political maladies found in other communities: the soap syndrome - one hand washes the other; complacency - be concerned only when someone gets caught; and lockjaw - don't rock the boat."). Accordingly, there is no conflict with *Alachua County* and the County's Petition should be denied.

B. This Case Does Not Expressly Affect Constitutional Officers

In this case, the Second District did nothing more than interpret long-standing constitutional and statutory provisions describing the duties of the Clerk. Thus, the Second District explicitly examined Article 8, Section 1(d) of the Florida Constitution, Article II § 5(c) of the Florida Constitution and Sections 28.12, 129.09, 136.06(1) and 136.08 of the Florida Statutes which define the Clerk's constitutional and statutory roles as custodian of County funds and County auditor. *See Brock*, 2009 WL 3012705

at *2. However, with the exception of Florida Statute, Section 136.08, which the County briefly and blithely dismisses as an apparently irrelevant “statutory public banking scheme” (County’s Petition at 1, 2), the County never addresses the fact that the Second District was doing nothing more than engaging in statutory interpretation of various provisions of the Florida Statutes and the Florida Constitution. Even for Section 136.08, the County conveniently ignores that Judge Silberman’s dissent (upon which the County relies in its Petition) concluded that Section 136.08 provides the Clerk the authority “to inspect and examine County accounts,” and that “the statutory provisions contain no time limits; in fact, Section 136.08 states ‘at all times’ regarding the Clerk’s authority to inspect and examine county accounts.” *Brock*, 2009 WL 3012705 at *9 (Silberman, J. *concurring in part and dissenting in part*). Thus, the Second District was engaging in the most fundamental of judicial functions: statutory interpretation. *See Costarell v. Florida Unemployment Appeals Commission*, 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)).

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, *Spradley* held that an opinion analyzing a prosecuting attorney’s compliance with a criminal discovery rule did not trigger this Court’s 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. 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. On the contrary, it is the County’s position that attempts to restrict the scope of the Clerk’s duties as they have historically been defined. The Second District simply engaged in the most fundamental of judicial functions - - statutory interpretation - - and reversed unprecedented and unsupportable restrictions that the trial court, at the urging of the County, 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 Second District's Opinion. 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 reviewed by this Court.

In *Spradley*, this Court expressly rejected such a broad jurisdictional sweep, and 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)).

Applying *Spradley*, this case is not the type that "affects" constitutional officers because the Second District did nothing more than construe existing state statutes and constitutional provisions that already define the role of all clerks in the state. The cases cited by the County do not alter this conclusion. For example, both *Florida State Board of Health v. Lewis*, 149 So. 2d 41 (Fla. 1963) and *City of Waldo v. Alachua*

County, 249 So. 2d 419 (Fla. 1971) were decided before this Court narrowed the jurisdictional reach of Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iii) in its *Spradley* decision. Additionally, *Cook v. City of Jacksonville*, 823 So. 2d 86 (Fla. 2002) is distinguishable because, in that case, this Court was asked to determine whether county home rule charters that added term limits to constitutional officers ran afoul of the Florida Constitution. There was no statutory or direct constitutional guidance that would otherwise govern the issue. Thus, this Court accepted discretionary jurisdiction in order to provide guidance to counties and constitutional officers in the absence of any applicable statutes. Similarly, in *Chief Judge of the Eighth Judicial Circuit v. Board of County Comm’r of Bradford County*, 401 So. 2d 1330 (Fla. 1981) there also were no statutory or constitutional provisions that would otherwise govern the case. Rather, in that dispute, regarding the allocation of space at courthouse facilities, “the county commission acted unilaterally,” and the “courts then responded unilaterally” *Chief Judge*, 401 So. 2d at 1332. Once again, due to the absence of generally applicable statutory law, it was necessary for this Court to accept jurisdiction and provide guidance to courts and county commissions on how to resolve disputes over the allocation of courtroom facilities. Thus, the cases cited by the County demonstrate that this Court will only exercise discretion to review decisions of

the district courts that “affect” constitutional officers where there is otherwise a gap in the governing law. In this case where there is no gap in the governing law, where there are numerous statutory and constitutional provisions that define the duties of clerks, and where the Second District has done nothing more than to construe those statutes and provisions, this Court should decline discretionary review. *See Spradley*, 293 So. 2d at 701.

CONCLUSION

For the reasons discussed above, the Clerk respectfully requests that this Court decline discretionary review and deny the County's Petition.

Dated: December 17, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Overnight Delivery this 17th day of December, 2009 to the following:

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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 Time New Roman, 14-point.

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