IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF PUBLIC HEALTH, DIVISION OF RISK MANAGEMENT,

Petitioners,

vs.

MURIEL WILCOX,

Respondent.

CASE NO. 70,498

INITIAL BRIEF OF PETITIONERS ON THE MERITS

H. B. YANDLE
VERNIS & BOWLING, P.A.
Attorneys for Petitioners
2398 South Dixie Highway
Miami, Florida 33133

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSITUTION, AND STATUTES

INTRODUCTION

This petition for review involves a Rule Nisi proceeding pursuant to Sec. 440.24(1), Florida Statutes to enforce a Workers' Compensation Order against the State of Florida for the amount of the Social Security offset that the State of Florida had taken. The State of Florida maintained that it was taking the Social Security Offset unilaterally as a matter of right, while Muriel Wilcox through her attorney maintains that the allowance of the offset is discretionary with the Court and her acquiescence. The Third District agreed that the offset could not be taken until the order of the deputy commissioner was modified pursuant to the provisions of Section 440.28, Florida Statutes and further that levy and execution were a matter of right against the State. The parties shall be referred to as:

MURIEL WILCOX as: Wilcox, employee, claimant and respondent.

THE STATE OF FLORIDA, DEPARTMENT OF PUBLIC HEALTH, DIVISION OF RISK MANAGEMENT as: State, employer/servicing agent, and petitioners.

The following symbols will be used:

(AP-) for appendix of petitioner and page number. All emphasis has been added by the respondents unless noted otherwise.

STATEMENT OF THE CASE AND OF THE FACTS

THE CASE BEFORE THE 11TH JUDICIAL CIRCUIT COURT

This is a Workers' Compensation case that has been appealed to the First District Court of Appeal twice and to the Third District Court of Appeal twice. State, Dept. of Public Health v. Wilcox, 458 So.2d 1207 (Fla. 1st DCA 1984), State, Dept. of Public Health v. Wilcox, 478 So.2d 850 (Fla. 3rd DCA 1985), State, Dept. of Public Health v. Wilcox, 483 So.2d 21 (Fla. 1st DCA 1985), State, Dept. of Public Health v. Wilcox, 504 So.2d 444 (Fla. 3rd DCA 1987) The present action involves a final judgment with execution issued by the Honorable Richard Dale Feder in favor of Muriel Wilcox and against the State of Florida on May 8, 1986. (AP-93 & 94) Judge Feder ordered the State not only to pay some $29,735.44 but also ordered the State "to comply in full with said Order (Workers' Compensation Order entered February 5, 1985) until and unless modified by the admintrative agency known as the Department of Labor & Employment Security, Office of the Deputy Commissioner." (AP-93 & 94)

The Facts of the Workers' Compensation claim are discussed in the prior decisions of the First District. State, Dept. of Public Health v. Wilcox, 458 So.2d 1207 (Fla. 1st DCA 1984), State, Dept. of Public Health v. Wilcox, 483 So.2d 21 (Fla. 1st

DCA 1985) However, a brief synopsis will be given. Wilcox filed a claim for both medical and disability benefits based on an accident in 1978. She had a second, non-compensable accident in 1979. The DC awarded permanent total compensation benefits and medical for both accidents. This order was reversed and remanded. Wilcox, 458 So.2d 1207

A second order was entered awarding the same benefits.(AP-3 to 17) This order was appealed, but during that appeal, Alfred D. Bieley brought a Rule Nisi to enforce the order under appeal. The Honorable Richard Dale Feder granted Wilcox a final judgment on that Rule Nisi which was appealed to the Third District Court. The Third District Court reversed and remanded with directions to dismiss. Wilcox, 478 So.2d 850 The First District issued its order on December 10, 1985 affirming the permanent total award but reversed and remanded on the issue of medical benefits. Wilcox, 483 So. 2d 21 Mr. Bieley requested a rehearing which was denied on February 4, 1986. The Mandate was not issued until March 7, 1986.(AP-21, 40, & 41)

The State elected to take the Social Security offset allowed by Sec. 440.15(9), Fla. Stat. A letter was sent to Alfred Bieley on December 27, 1985, asking him as Mrs. Wilcox's attorney to have her sign and return a Request For Social Security Disability Benefit Information which the State had a right to do pursuant to Sec. 440.15(9)(c), Fla. Stat. (AP-44 &

45) Mr. Bieley responded to a second request sent on January 22, 1986 with a letter dated January 27, 1986 in which he states:

> "Your letter of January 22, 1986 was received.
>
> If you do not promptly pay Mrs. Wilcox her compensation benefits within the time required under the law, your client will be responsible for penalties, interest and attorney's fee.
>
> Furthermore, a Rule Nisi will be instituted again if you do not comply with the Order."(AP-46)

On February 25, 1986, another letter with a Request For Social Security Disability Benefit Information was sent to Mr. Bieley. (AP-47 & 48) On February 26, 1986, a Notice of Taking Deposition of Muriel Wilcox on March 3, 1986 was mailed to Mr. Bieley. (AP-49) A subpoena was served on Mrs. Wilcox requesting that she bring all records showing what Social Security Benefits she had received. (AP-50) A deposition of the Social Security Administration was also noticed for March 3, 1986; however, the Social Security Administration refused to supply the records for Muriel Wilcox by deposition but did mail some of the information as to monthly amount being received by Mrs. Wilcox to DC Alan Kuker on March 3, 1986. (AP-51, 52, 53, 59 to 61) A Motion to Compel Muriel Wilcox to sign a Request for Social Security Disability Benefit Information was also filed with DC Kuker. (AP-54 to 56) On March 3, 1986, Mr. Bieley called counsel for

the State to inform him that Mr. Bieley had instructed his client, Mrs. Wilcox, not to attend the scheduled deposition without giving any reason for the refusal to appear. (AP-62 to 65)

Despite Mrs. Wilcox's refusal to comply with Sec. 440.15(9)(c), Fla. Stat., the State paid Mrs. Wilcox her benefits. (AP-23 to 28) The State took the Social Security Offset based on the information obtained from DC Kuker who in turn had received it from the Social Security Administration.(AP-51 to 53, and 59 to 61).

On March 26, 1986, Mr. Bieley filed a petition for a Rule Nisi with Judge Feder who had been reversed on the prior Rule Nisi by the Third District. Wilcox, 478 So.2d 850 (AP-1 to 31) On April 2, 1986, Judge Feder issued a Rule Nisi with a hearing set for May 7, 1986. (AP-32 & 33) The hearing was held on May 7, 1986. (AP-71 to 90)

The crux of the hearing was not over whether the Social Security Offset had been taken correctly but whether the State could even take the Offset without Petitioning to Modify under Sec. 440.28, Fla. Stat. (AP-73, 78, & 83) Wilcox's position was that no Social Security Offset could be taken whatsoever until the DC issued an order allowing them to do so.(AP-73 & 83) The State took the position that the Offset provision was self-executing and could be taken administratively when the Social

Security information could be obtained. (AP-80, 84, & 85) The State also pointed out to the court that since Mrs. Wilcox had refused to comply with Sec. 440.15(9)(c), Fla. Stat., it did not have to pay Mrs. Wilcox at all. (AP-86-88) The trial court was apprised that the State was not amenable to Sec. 440.24 proceedings, since State property is not subject to levy or execution (AP-85)

The judge at one point was inclined to relinquish jurisdiction to the DC to have him rule on the propriety of the social security offset. (AP-81, 82, 83) At another point the judge realized that since Mrs. Wilcox had not signed a release for Social Security Information, that no order should be entered on the Rule Nisi. (AP-87) The judge was fully apprised of the mechanics of taking the Offset by Administrative action, but suddenly announced that he was granting the Rule Nisi and letting the "Deputy Commissioner straighten it out, <u>if he can</u>..." (AP-84, 85, & 88) The judge did specify that he was granting the Rule Nisi solely on the ground that the State had to petition to modify the DC's order under Sec. 440.28, Fla. Stat. in order to take the Social Security Offset. (AP-88 & 89).

Since the Judge entered a <u>Final Judgment</u> against the State with <u>execution</u> even though he said that the Deputy Commissioner should straighten the Social Security Offset issue out, the State filed an appeal to the Third District Court of Appeal.

(AP-66)

THE CASE BEFORE THE THIRD DISTRICT COURT OF APPEAL

The Third District affirmed the trial court in State, Dept. of Public Health v. Wilcox, 504 So.2d 444 (Fla. 3rd DCA 1987) stating that the Final Judgment enforces a workers' compensation order for the full amount of medical and compensation benefits awarded. (Ap-95) The Third District correctly stated the position of the Petitioners:

> The state maintains that it properly deducted social security payments from Mrs. Wilcox's awards, that the circuit lacked jurisdiction to authorize execution and levy against the state, and that, like any other employer, the state may unilaterally modify the deputy commissioner's order by taking a social security off-set pursuant to section 440.15(9), Florida Statutes (1985). We disagree and affirm. (Ap-95 & 96)

The Third District explicitly held that an employer may not take the social security set-off unilaterally but must apply for modification under Section 440.28, Florida Statutes. (Ap-96) The Third District did admit however that the decision of the First District in Colonel's Table v. Malena, 412 So. 2d 64 (Fla. 1st DCA 1982) was to the contrary but the appellate court refused to certify this conflict. (Ap-96, 100 to 103)

The Third District went on to hold that Section 440.02,

Florida Statutes which defines that the State of Florida as an employer clearly makes the State amenable to execution and levy under Section 440.24, Florida Statutes thereby declaring this statute to be valid and thereby affecting in this instance, the executive branch of the government. (Ap-96 & 97) This ruling is in direct conflict with the Third District's own ruling in Berek v. Metropolitan Dade County, 396 So.2d 756 (Fla. 3rd DCA 1981), but the Third District declined to resolve this conflict by an en banc hearing. (Ap-98 & 99)

After the rejecting the petitioners' request for rehearing and clarification and request for rehearing en banc, the Third District issued its order of denial on April 20, 1987. (Ap-103) The Notice to Invoke Discretionary Jurisdiction to this Court was filed on May 4, 1987 with the Third District. (Ap-104)

SUMMARY OF ARGUMENT

POINT I

The decision of the Third District Court of Appeal sought to be reviewed in in direct conflict with numerous decisions of the First District Court of Appeal. The First District holds that an employer/carrier is free to take the social security offset allowed by Section 440.15(9), Florida Statutes (1985) as soon as it receives the information as to what the social security administration is paying the claimant without petitioning the deputy commissioner pursuant to Section 440.28, Florida Statutes for modification of his order. The offset is self-executing and meant be taken unilaterally. The position of the First District is preferable and correct.

POINT II

The decision of the Third District Court of Appeal in conflict with decisions of this court in holding that the property of the State of Florida is subject to levy and execution by a judgment creditor. In so holding, the Third District is expressly declaring Section 440.24, valid as to the State of Florida. This expressly effects a class of constitutional and

statutory officers, since the decision gives the judiciary the power to coerce the executive branch of the government in this case, thereby declaring that the legislative and judicial branches of the government can exercise power over the executive branch violating the separation of powers clauses of the Florida Constitution. The sovereign cannot be coerced by execution on its property for to allow such would destroy the means of government.

ARGUMENT

POINT I

WHETHER THE DECISION SOUGHT TO BE REVIEWED IS IN DIRECT CONFLICT WITH DECISIONS RENDERED BY THE FIRST DISTRICT DISTRICT COURT OF APPEAL

The employer/servicing agent take the position that Sec. 440.15(9), Fla. Stat. is self-executing in that no order of court, order of the deputy commissioner, or permission of the claimant is needed to take the Social Security setoff allowed to the employer/servicing agent. The claimant, Wilcox, takes the position that the employer/servicing agent can only take the setoff by petitioning to modify under Sec. 440.28, Fla. Stat. which in effect would delay the date of taking the setoff and further make this discretionary with the Deputy Commissioner.

Sec. 440.15(9) simply says that the employer/servicing agent can take a setoff when the claimant starts receiving Social Security Disability Benefits so that the combination do not exceed 80 percent of the claimant's average weekly wage or the 80 percent rule under the Social Security Act. The reason for this provision is because the Social Security Administration will take the setoff unless the employer/servicing agent does. 42 U.S.C. sec. 424(a) The issue is not whether the setoff will be

taken, the issue is whether the state of Florida or the Federal Government in the present case will take it. Either way, the claimant will be limited to the 80 percent.

The trial court did not understand what was meant by "administrative action". (AP-84) Counsel for the employer/-servicing agent tried to explain in plain English thusly,"You get the figures, you calculate it, and you take you offset." (AP-85) The employer/servicing agent maintained that the setoff was administrative and that no modification of the compensation order was needed from the Deputy Commissioner. (AP-88) The judge however, ruled that the setoff could not be taken without petitioning to modify the DC's order. (AP-88 & 89) In this he erred as a matter of law.

While there is a difference of semantics in the cases (some call the unilateral taking of the Social Security setoff "self-executing"; others call it an "administrative action"; at least one case terms it as "modification") the mechanism is the same. The employer/servicing agent obtains the Social Security information, computes the 80 percent, and takes the setoff immediately.

Colonel's Table v. Malena, 412 So.2d 64 (Fla. 1st DCA 1982) speaks of administrative action.

> "The statutory offset may be taken administratively, and is not dependent on the order of a deputy commissioner.**-

> *Employer/carrier remains free to administratively make such statutory offset when it obtains the pertinent information." Florida Power & Light Co. v. Adkins, 377 So.2d 57 (Fla. 1st DCA 1979)

In Borden, Inc. v. Butler, 377 So.2d 795 (Fla. 1st DCA), the court in describing the similar unemployment offset said:

> "The employment compensation set-off, like the Social Security set-off under Section 440.15(10), Florida Statutes (now Sec. 440.15(9)), is self-executing, giving rise to a continuing right and responsibility on the part of carriers to compute the correct set-off at the time a payment of compensation is due. ...the carrier is free to make this computation on its own and deduct the amount from its award to the claimant. Should the claimant disagree with this computation, he may file a claim and have the matter determined by the judge." see Sherrod Drywall v. Reeves, 378 So2d 301 (Fla. 1st DCA 1980), Lister v. Walker, 409 So.2d 1153 (Fla. 1st DCA 1982)

The burden is on the claimant to go before the Deputy Commissioner if she believes that the set-off was not computed correctly; the burden is not on the employer/servicing agent as the circuit judge mistakenly ruled. (AP-86) If Mrs. Wilcox feels aggrieved by the amount taken by the employer/servicing agent, then her remedy is before the deputy commissioner. However, she still must comply with Sec. 440.15(9)(c) and sign the Social Security Information Release. What does she have to hide? Barruzza v. Suddath Van Lines, Inc., 474 So.2d 861 (Fla. 1st DCA 1985), dissenting opinion.

Only Harrell v. Florida State University, 427 So.2d 1089 (Fla. 1st DCA 1983) speaks of "modification" in regard to taking the Social Security set-off. However, the context of the case really points to the same action described as "self-executing" and "administrative action" unless the First District is in conflict with its own decisions which one presumes not:

> "Although we find that the discovery of a greater amount of social security benefits by the carrier is a sufficient basis for modification of a prior compensation order, in that the carrier has a continuing right and responsibility to compute the correct setoff at the time a payment of compensation is due...."

Since the language indicates that the set-off is to be taken when each payment is due, then no time gap is indicated between obtaining the Social Security information and taking the off-set. If this were not so, then in those instances where the claimant stops receiving Social Security benefits, the employer/servicing agent could take the off-set until the claimant petitioned to modify under Sec. 440.28, Fla. Stat.

The petitioners note that the Third District followed its prior decision in Troy Desk Manufacturing Company, Inc. v. Troy, 448 So.2d 46 (Fla. 3rd DCA 1984) which was in direct conflict with the First District in Lister v. Walker, 409 So.2d 1153 (Fla. 1st DCA 1982). In both cases, Sec. 440.15(1)(d), Fla. Stat. was in issue. In Lister, the First District held that the Section

which applies to permanent total disability set-off is self-executing, and therefore the off-set could be applied as soon as the employer/carrier had notice of it. However, in Troy, the Third District held that off-set could not be taken until the order awarding permanent total benefits had been modified pursuant to Section 440.28, Fla. Stat.

The Third District's decision in the present case is in direct conflict with the decision of the First District in Colonel's Table v. Malena, 412 So.2d 64 (Fla. 1st DCA 1982) as even the Third District recognized, yet refused to certify the direct conflict to this court. (AP-100-102) While the petitioners believe that the position of the Third District in Troy is wrong, it can be distinguished from the present case. In Troy, the claimant had been adjudicated permanently and totally disabled but later was discovered to be working! Supra. Now, when the employer/carrier in that case took the unilateral offset, the claimant, however justly, was actually deprived of benefits. In the present case, the claimant will not be deprived of benefits, since the Social Security Administration will take the offset if the petitioners do not. The argument is who will get the offset, not whether there will be an offset.

Despite this distinction, the petitioners believe that both this case and Troy should be reversed and the position of the

First District approved. This is because the Workers' Compensation system is not designed or planned to give claimants a double recoveries, i.e. working and receiving permanent total benefits, receiving full workers' compensation benefits and full unemployment benefits simultaneously, or receiving full workers' compensation benefits and full social security benefits at the same time. It is designed to help injured workers and by making their disability and medical benefits received from industrial injuries a cost of doing business. It is not law nor right to have claimants reap windfalls from the system.

The position of the First District that the offset is self executing and needs no order of court or modification to be taken must be affirmed and approved.

POINT II

WHETHER THE DECISION SOUGHT TO BE REVIEWED EXPRESSLY DECLARES VALID A STATE STATUTE AND AFFECTS A CLASS OF CONSTITUTIONAL AND STATE OFFICERS

The petitioners believe that the issue of whether an individual can levy and execute against state property is of great public importance; however, the Third District refused to certify this question to this court. (Ap-100-103)

However, the petitioners maintain that it can be reviewed under a conflict of decisions since this court has held to the contrary in Meriwether v. Kilbee, supra. Also, the Third District has expressly ruled that Chapter 440, Florida Statutes is valid in its entirety against the State of Florida violating the separation of powers clause of the Florida Constitution. Art. II, Sec. 3, Fla. Const. This ruling also affects a class of constitutional and state officers created by Art. IV, Sec. 6, Fla. Const.

The particular statute that the Third district Court of Appeal held as totally valid as to the State of Florida is Section 440.24, Florida which reads:

> "In case of default by the employer or carrier in the payment of compensation due under any compensation order of a deputy commissioner or other failure by the employer or carrier to comply with such

> corer within 10 days after the order becomes final, any circuit court of the this state within the jurisdiction of which the employer or carrier resides or transacts business shall, upon application by the division or any beneficiary under such order, have jurisdiction to issue a rule nisi direction such employer or carrier to show cause why a writ of execution, or such other process as may be necessary to enforce the terms of such order, shall not be issues, and, unless such cause is shown, the court shall have jurisdiction to issue a writ of execution or such other process or final order as may be necessary to enforce the terms of such order of the deputy commissioner." Sec. 440.24(1), Fla. Stat.

The Third District held that this general language puts the State of Florida under the same obligations and liabilities as a private employer including execution upon its property. (AP-95-97) State, Dept. of Public Health v. Wilcox, 504 So.2d 444 (Fla. 3rd DCA 1987) It is true that the decision purports to limit execution to the amount of the State's insurance. Supra. However, since the state of Florida is self insured, this is no limitation at all and subjects each and all state property wherever located to seizure and sale by the judgment creditor.

It is plain that the Third District has given free reign to judgment creditors to seize and destroy the property belonging to the executive branch of the state government in derogation of the separation of powers enunciated in Florida Constitution. Art. II, Sec. 3, Fla. Const. This decision also affects a

class of constitutional and state officers created by Art. IV, Sec. 6, Fla. Const in that the legislature according to the Third District has given the judiciary the power to coerce, restrain, and destroy the powers given to the executive branch.

The petitioners offer the following as authority and guidance in this matter. There are basically three grounds prohibiting levy and execution against public property: (1) Statute, (2) Public Policy, and (3) Constitutional Prohibition. The petitioners emphasize (3) strongly.

Statute

Numerous decisions hold that there must be an express statue allowing levy and execution against a state, its departments, and political subdivision, and that such power will not be inferred from a general statute governing executions and similar remedies; the lack of a statute or authority exempting the state from execution on its funds and property does not infer the right to do so; the power must be express.

In Berek v. Metropolitan Dade Cty, 396 So.2d 756 (Fla. 3rd DCA 1981), the Third District itself said:

> "A judgment creditor may not obtain a lien against or levy execution against the property or funds of a state, county, or municipal corporation in the absence of express authorization.(cites omitted) A creditor must depend on the willingness of the state and the availability of funds if he is to collect his judgment at all. It is these factors, not compulsion, that cause

> the state to pay judgments, and will likely cause the state to pay them promptly." See also, Meriwether v. Kilbee, 18 So.2d 534 (Fla. 1944)

In Brooks v. One Motor Bus, Etc., 3 S.E.2d 42 (S.C. 1939), the Supreme Court of South Carolina decreed in response to this same inquiry:

> "It is also the law that no execution can be levied against the property of a county, state, or any political subdivison of the state, in the absence of a statute expressly granting such right in express terms. (cites omitted) Under the foregoing authorities, the principle is adhered to that property held for public uses, such as public buildings, parks, wharves, fire engines, hose and hose carriages, court houses, jails, school houses, and generally everything held for government purposes, is not subject to levy and sale under execution against public corporations. The compelling reason underlying the rule is that levying upon and selling property used for governmental purposes, such, for instance, as a school district bus, engaged in the transportation of school children, might work irreparable injury, and could destroy the public school system of a district."

Please note that division of the State in question is the Department of Public Health. Should health services be disrupted in Dade County by the seizure and sale of the instruments and facilities for providing those services?

In Commonwealth v. Circuit Court, 365 S.W.2d 106 (Ky. Ct. App. 1963), The Court of Appeals of Kentucky stated:

> "It is the general doctrine that judgments

> against a state, in cases where it may be sued, should be considered to operate merely to liquidate and establish the debt of a claimant; and in the absence of an express provision otherwise, they cannot be enforced by the ordinary processes of law.(cite omitted) 'Even though the rule as to immunity of a state is relaxed, the power of the courts ends when the judgment is rendered. Although the liability of the state has been judicially ascertained, the state is at liberty to determine for itself whether to pay the judgment or not, and execution cannot issue on a judgment against the state.'(cites omitted)" see also State, Department of Highways v. Olsen, 334 P.2d 847 (Nev. 1959)

Since there is no statute expressly allowing levy and execution against the State of Florida, and Sec. 440.24 is a general statutory provision making property subject to execution, there is no statutory authority for permitting a Rule Nisi proceeding against the State of Florida. Commonwealth v. Circuit Court., supra.

PUBLIC POLICY

The courts have also prohibited execution and levy on state property on the grounds that for not to do so would offend public policy. This is only common sense since a disgruntled judgment creditor could disrupt vital instruments of government and create anarchy and chaos. One can imagine, the seizure and sale of an emergency switchboard, traffic control devices, and the typewriters and office furniture of the Department of Public Health.

In First Nat. Bank in Bozeman v. Sourdough L. & C. Co., 558 P.2d 654 (Mon. 1976), a judgment creditor obtained a writ of execution against the State of Montana and executed on funds of the State of Montana on deposit with the First Nat. Bank in Bozeman whereupon, the bank filed an interpleader joining the judgment creditor and the State of Montana. The Supreme Court of Montana held:

> "Property and revenue necessary for the exercise of these powers become part of the machinery of government, and to permit a creditor to seize and sell them to collect his debt would be to permit him in some degree to destroy government itself.
>
> We hold that the state as a 'judgment debtor' and subject to execution would result in the impairment of its sovereign powers and would be contrary to public policy."

The court in Brooks v. One Motor Bus, Etc. similarly stated:

> "We cannot admit, as was said by the Court in Emery County v. Burresen, supra (14 Utah 328, 47 P. 92), 'that any individual possesses such power under our laws as would enable him, in securing a private end, to put an end to the functions of a political organization, and thus disorganize and destroy the government.'" see also Addison v. Addison, 530 S.W.2d 920 (Tex. Civ. App. 1975)

Therefore based upon public policy alone, a Sec. 440.24 action cannot be allowed against the State of Florida lest Pandora's Box be opened.

CONSTITUTIONAL PROHIBITION

This for not permitting levy and execution against State property is based on the separation of Powers; Executive, Legislative, and Judicial. A leading case, which also clarifies this basic concept, is Carter v. State, 42 La. Ann. 927, 8 So. 836 (La. 1890). In that case, the Supreme Court of Louisiana held that even if the legislature should enact a law permitting execution against the state, such law would be unconstitutional, null, and void.

> "We are quite satisfied that if the legislature had expressly authorized the court to execute this judgment by the issuance of the writ of fi. fa. and the seizure and sale of the property of the state for its satisfaction, such action would have been unconstitutional, null, and void. Articles 14 and 15 of the constitution divide the powers of government into three distinct departments, and provide that 'no one of these departments, nor any person or collection of persons holding office in any one of them, shall exercise power properly belonging to either of the others.'"

The court went on to say that state funds and property are under the control of the legislative branch, not the judiciary. supra., Cf. O'Neill v. State Highway Dept., 50 N.J. 307, 235 A.2d 1 Therefore, no statute could give the judiciary the power to issue writs of execution against the property of the state due to the separation of powers. Otherwise, one branch of government would have the power to destroy or cripple another branch.

So whether based on the constitutionality of the statute as construed by the Third District or whether the decision effects a class of constitutional officers (the executive branch in this case) or whether the decision of the Third District is in conflict with the decision of this court in Meriwether v. Kilbee, the decision must be reversed with a holding that state and public property is immune for levy and execution by judgment creditors.

CONCLUSION

This honorable court should approve the decisions of the First District and declare that the setoff for social Security benefits is self executing and that no petition for modification is required to take this offset. Above all the decision of the Third District must be reversed as to the allowance of levy and execution on state property by judgment creditors with a ruling that the State of Florida is not amenable to Sec. 440.24 proceedings.

Respectfully Submitted,

VERNIS & BOWLING, P.A.
Attorneys for Petitioners
2398 South Dixie Highway
Miami, Florida 33133

By: _____
H. B. Yandle

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioners on the Merits was mailed this 17 day of September, 1987 to:

ALFRED D. BIELEY, ESQUIRE
Biscayne Building
19 West Flagler Street
Miami, Florida 33130

VERNIS & BOWLING, P.A.
Attorneys for Petitioners
2398 South Dixie Highway
Miami, Florida 33133
Telephone (305) 854-3035

By: _____
H.E. YANDLE

HBY:mjw