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IN THE SUPREME COURT OF FLORIDA

Case No. 76,090
(Consolidated with Case No. 76,803)

DICK LOCKE,

Petitioner,

v.

PAUL M. HAWKES,

Respondent.

PETITIONER'S INITIAL BRIEF

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

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PRELIMINARY STATEMENT

In this brief, the Petitioner Dick Locke, will be referred to by name or as the Petitioner. The Respondent Paul M. Hawkes will be referred to by name or as the Respondent. Citations to the original record will be made by the letter "R" and the appropriate page number. References to the appendix will be made by the letter "A" and the appropriate page number.

STATEMENT OF THE CASE AND OF THE FACTS

This action initially arose in the context of a political campaign preceding the November 8, 1988 general election to select a representative for Florida House of Representatives District 26. Prior to the election, Respondent Paul M. Hawkes, a contender for the District 26 seat, filed a petition in Citrus County Circuit Court invoking the provisions of Chapter 119, Florida Statutes, to coerce the production of documents of the then incumbent, Petitioner Dick Locke (R-1-3).[1] The records sought by the Respondent were those relating to the district office allotment received by Locke pursuant to Section 11.13(4), Florida Statutes. (R-2). On September 28, 1988, Locke furnished to Hawkes copies of all bank deposit slips, monthly bank statements, checks and check stubs for the period 1985 forward. (R-9). These records reflected the receipt and deposit of each allowance received by Locke pursuant to Section 11.13(4), Florida Statutes and each item of expenditure during this period. Copies of such records occupy 425 pages of the original record. (R-10-435). In furnishing these records, Locke did so as a matter of legislative policy and not as a function of Chapter 119, Florida Statutes (R-5, 9, 455).

Thereafter, on October 4, 1988, Locke served his Motion To

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[1]Locke won re-election in November, 1988. In the November 1990 election for House District 26, Locke and Hawkes again faced each other. At this election Hawkes prevailed and he began serving his term of office on November 20, 1990.

Dismiss (R-5-8). Following notice and hearing, the circuit court entered its Final Order (R-470-471) dismissing the Chapter 119 petition on the grounds that the court was without subject matter jurisdiction under the separation of powers doctrine. (The court also held that if it did have jurisdiction it would find as a matter of statutory interpretation that Chapter 119 does not apply to the legislative branch of Florida government). Thereafter an appeal was taken by Hawkes to the Fifth District Court of Appeal which, in an opinion which became final on April 30, 1990, reversed the order of the trial court (Appendix A). The Petitioner Dick Locke timely filed his Notice To Invoke Discretionary Jurisdiction and following submission of jurisdictional briefs by the parties, this Court accepted jurisdiction by Order dated October 31, 1990.

SUMMARY OF ARGUMENT

Legislative records are open. They are open to any member of the public in the manner set forth in legislative rules and in accordance with legislative policy. In this case, the judiciary is being urged to assert control over legislative papers. Neither the Florida Constitution nor the Florida Statutes permit such an invasion of the legislative province.

As a fundamental tenet of Florida's Constitution, the judiciary is without jurisdiction over matters of legislative procedure. Case law demonstrates that the control and direction of the papers of each branch of Florida government are matters of

internal procedure. The doctrine of separation of powers requires that the legislature alone is empowered to develop and administer policy regarding its legislative papers. Furthermore, by its terms, Chapter 119 does not have application to the Florida legislature. If there exists any ambiguity with respect to this premise, the external indicia of legislative intent make it clear.

ARGUMENT

POINT 1

THE DISTRICT COURT ERRED IN ASSERTING JURISDICTION TO COMPEL THE PRODUCTION OF LEGISLATIVE PAPERS.

While the circuit court founded its ruling upon a lack of jurisdiction by reason of the doctrine of separation of powers, the district court of appeal glossed the application of the doctrine without analysis. The only reference to the separation of powers doctrine is a two-sentence dismissal of its applicability (A-3). The principle that one branch of government shall not intrude upon another is fundamental to Florida government. The failure of the district court to consider this principle is the basis for its error.

The legislative power of the State of Florida is vested in the Florida Legislature consisting of the Florida House of Representatives and the Florida Senate. Article III, Section 1, Fla. Const. In the implementation and furtherance of this provision, Article III, Section 4(a), Fla. Const., provides that "Each house shall determine its rules of procedure". These

provisions commit the determination of legislative procedure to the legislative branch of government. Further, Article II, Section 3, Fla. Const., mandates the separation of the legislative, judicial, and executive branches of state government and directs that "no person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

The judiciary's role in regard to legislative powers is clearly defined: The judiciary is to measure enactments of the legislature against the constitutional requirements for the making of laws. General Motors Acceptance Corporation v. State, 152 Fla. 297, 11 So.2d 482 (1943). In Carlton v. Mathews, 103 Fla. 301, 137 So. 815 (1931), this court stated:

> ...while it is the highest duty of the courts to enforce the principles of the constitution, they should be careful not to invade the domain of the legislative department. 137 So. at 847, 848.

The parameters of judicial authority in legislative matters were examined in the light of the separation of powers doctrine in Brewer v. Gray, 86 So.2d 799 (Fla. 1956):

> The Legislature is a coordinate branch of the government and even though the performance of a duty is required by the Constitution, the courts, being another coordinate branch of government, are not authorized to compel the Legislature to exercise a purely legislative prerogative. 86 So.2d at 803.

In Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963 (1912) this Court emphasized the broad power of each house of the legislature to interpret and enforce its own procedures. Such power extends beyond the authority merely to adopt formal rules:

> The provision that each house "shall determine rules of its proceedings" does not restrict the power given to the mere formulation of standing rules, or to the proceedings of the body in ordinary legislative matters; when exercised by a majority of a constitutional quorum, such authority extends to the determination of the propriety and effect of any action as it is taken by the body as it proceeds in the exercise of any power, in the transaction of any business, or in the performance of any duty conferred upon it by the constitution. 59 So. at 968.

In McPherson v. Flynn, 397 So.2d 665 (Fla. 1981), this Court held that under the doctrine of separation of powers, it lacked jurisdiction to inquire into the qualifications of a duly elected member of the House of Representatives pursuant to Article III, Section 2, Florida Constitution. The Court stated that:

> ...the doctrine of separation of powers requires that the judiciary refrain from deciding a matter that is committed to a coordinate branch of government by the demonstrable text of the constitution. 397 So.2d 667.

Moreover, in applying the separation of powers doctrine to public records and open government statutes, this Court has consistently guarded the power of the coordinate branches of Florida government from encroachment by another branch. In Johnson v. State, 336 So.2d 93 (Fla. 1976) this Court was faced with a statute which ostensibly required the destruction of judicial records. The Court explained the nature of the separation of powers doctrine as follows:

> The separation of powers of the three branches of government - legislative, executive and judicial - is a constitutional rule upon which our system of government has survived from its inception. It is essential that to safeguard this system the preservation of the inherent powers of the three branches must be free from encroachment or

infringement by one upon the other.

* * *

> To permit a law to stand wherein the legislature requires the destruction of judicial records would permit an unconstitutional encroachment by the legislative branch on the procedural responsibilities granted exclusively to this court. 336 So.2d at 95.

In 1981 this Court was presented squarely with the question of whether Chapter 119 applied to the judiciary. The records at issue in In Re Advisory Opinion Concerning the Applicability of Chapter 119, Florida Statutes, 398 So.2d 446 (Fla. 1981) were investigative files of the Florida Bar. The Court stated:

> If judicial entities are included within the scope of chapter 119, the legislature has sought to exercise legislative power concerning a matter that is explicitly withheld and vested elsewhere in the constitution, i.e., Article V. 398 So.2d at 447.

The court concluded with its holding:

> The unauthorized practice of law investigative files of the Florida Bar, as an official arm of this court, are subject to the control and direction of this court and not to either of the other branches of the government. 398 So.2d at 448.

Likewise, legislative records are subject to the exclusive control and direction of the legislature and not to the interpretive or coercive power of the other branches of government.

In Moffitt v. Willis, 459 So.2d 1018 (Fla. 1984), this Court ruled dispositively on the issue presented here. In that case, the Court was responding to a petition for writ of prohibition by the legislature when it held that the judiciary was without jurisdiction to invade the legislature's internal procedures with

respect to open meetings. The court's analysis focused on the authority of the legislature over its internal affairs:

> Article III, section 4(a) of the Florida Constitution gives each house the power to determine its own rules of procedures. As historically interpreted by this court, this provision gives each house the power and prerogative not only to adopt, but also to interpret, enforce, waive or suspend whatever procedures it deems necessary or desirable so long as constitutional requirements for the enactment of laws are not violated. 459 So.2d at 1021.

Thus, the Court concluded:

> Just as the legislature may not invade our province of procedural rulemaking for the court system, we may not invade the legislature's province of internal procedural rulemaking. 459 So.2d at 1022.

Rule 1.11, Rules of the Florida House of Representatives, entitled, "Legislative Records", embodies precisely the type of procedural rulemaking that Moffitt v. Willis viewed as inviolate from judicial encroachment. (Appendix B; R-443). The willingness of the district court to assume jurisdiction to coerce legislative records pursuant to Chapter 119 conflicts with the separation of powers doctrine as articulated in Moffitt v. Willis. To assert jurisdiction to coerce records under Chapter 119 is to co-opt the power of the legislature to apply and interpret its own rules on the same subject.

Rule 1.11 of the Florida House of Representatives and Chapter 119, Florida Statutes, are incompatible. House Rule 1.11 sets forth the specific categories of legislative papers and records which are available for public inspection. In contrast, Chapter 119 makes all executive branch records open unless statutorily

exempted. To overlook the jurisdictional bar to addressing the meaning of House Rule 1.11, or to ignore it, is to nullify and suspend the legislative prerogative respecting the control and direction of legislative papers. Moreover, the determination of which papers and records produced in the course of legislative business are subject to House Rule 1.11 is exclusively a legislative determination. As stated in Moffitt v. Willis:

> The petitioners [legislators] have never conceded that the meetings complained of were secret legislative committee meetings. In our view, a judicial determination of this matter hinges on the meaning of legislative committee meeting and what activity constitutes such a meeting. At this point, the judiciary comes into head-to-head conflict with the legislative rulemaking prerogative. 459 So.2d at 1021.

Likewise, the judiciary comes into head-to-head conflict with the legislative prerogative when it exercises jurisdiction to direct the meaning, management and control of legislative records.[2]

Under Florida's Constitution, each house of the legislature is invested with the power to govern its internal procedures. If a statute were to be applied in a manner which impaired the power of the House of Representatives or the Senate to make, enforce, interpret or waive its internal procedural rules, the statute itself would be unconstitutional as applied. Just as the power of

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[2]The House of Representatives has recently acted again in exercising its prerogative to manage and control legislative records. House Rule 1.11 was initially adopted on November 22, 1988. (R-443). On November 20, 1990, at its organization session, the House adopted House Resolution No. 1 (Appendix C) which amended Rule 1.11 to emphasize that legislative records include those maintained in district offices as well as those maintained in Tallahassee.

the judiciary to control its papers is a contemporaneous power belonging to the Court as it is constituted from time to time, the power of each house of the legislature is contemporaneous under Article III, Section (4)(a). In contrast to the legislative power to make law under Article III, Sections 7 and 8, the power of each house to govern its procedural affairs under Article III, Section (4)(a) does not require the concurrence of the other house of the legislature nor of the governor. A statutory scheme, such as Chapter 119, which required the House of Representatives to obtain the concurrence of the Senate and Governor in order to alter or amend the way it governs its papers would be violative of Article III, Section 4(a).

The 1990 Florida Legislature underscored both the correctness of Moffitt v. Willis and the application of the separation of powers doctrine to internal procedures of the legislature with the passage of Senate Joint Resolutions 1990 and 2. (Appendix D). Pursuant to Article II, Section 1 of the Florida Constitution, the House of Representatives and the Senate agreed upon an amendment to Article III, Section 4, which was approved by the voters in the November 1990 general election. The constitutional amendment adds a new subsection stating that the rules of procedure of each house shall provide for open meetings among legislators. The principle articulated by this Court in Moffitt v. Willis, that each house has the power to interpret and enforce its own rules, is carried into the proposed constitutional amendment in language that is unequivocal:

> Each house shall be the sole judge for the interpretation, implementation, and enforcement of this section.

The House of Representatives implemented the new constitutional amendment at its organization session on November 20, 1990 with the creation of Rule 2.7 and 5.19 entitled "Open Meetings" (Appendix C).

The error of the district court lies in its belief that no separation of powers issue was before it because the records involved were those of "a particular member of a particular legislature, and not to the internal records of the legislature itself..." (A-3). This Court in Moffitt v. Willis determined that it had no jurisdiction to address the several grounds asserted against the legislature, including the applicability of Section 286.011, Florida Statutes, which requires that meetings of "any state agency" be open to the public. This Court reasoned that crossing the threshold of inquiry into the meaning of what activity constitutes a legislative meeting would lead inevitably to a conflict with the legislative prerogative. Here the district court exercised no such restraint.

The district court's attempt to make distinctions between kinds of legislative records demonstrates its error. No legislative records exist at all except at the instance of individual members of the legislature. Once having crossed the jurisdictional threshold and embarked on an inquiry into what constitutes a legislative record, the district court could not properly ignore the fact that the House of Representatives had

addressed the matter. The court had to be immediately drawn into an examination and interpretation of the provisions of House Rule 1.11 entitled "Legislative Records". This Rule sets forth which categories of legislative papers and records are available for public inspection. It is at this point that the district court's inquiry runs into direct conflict with the constitutional power of the legislature, as Moffitt v. Willis states, to "interpret, enforce, waive or suspend whatever procedures it deems necessary or desireable". As previously noted, the House has recently, by rule amendment, construed the meaning of legislative records in a way directly contrary to the construction of the district court. Under the November 1990 amendments to House Rule 1.11 (Appendix C-1), legislative records include those maintained by individual members in district offices.

The teachings of this Court on the nature of separation of powers doctrine show that the doctrine was overlooked or misapplied by the district court. The decision of the lower tribunal would leave the status of open government in disarray. This Court, unwilling to invade the legislative province in Moffitt v. Willis, refused to apply the open meetings statute to the legislature. Despite Moffitt v. Willis, the district court would incongruously apply the public records act to the legislature. Analytically, Moffitt v. Willis cannot be distinguished from the instant case.

POINT II

THE DISTRICT COURT ERRED IN FINDING AS A MATTER OF STATUTORY INTERPRETATION THAT CHAPTER 119, FLORIDA STATUTES, HAS APPLICATION TO THE FLORIDA LEGISLATURE.

The district court, having crossed the jurisdictional threshold, misapplied principles of statutory construction and entered upon a thicket with consequences that are erroneous, far-reaching and unintended. The touchstone of the applicability of Chapter 119 is the definition of public record, which means papers received or produced by an "agency"--, i.e. a "unit of government created or established by law". The opinion of the district court would erroneously bring two independent, co-equal branches of Florida government into Chapter 119 by first characterizing a member of the legislature or a member of the judiciary as a statutory "state officer" and by then equating the term "state officer" with the term "agency".

The plain language of Chapter 119, its statutory history, and all external indicia of legislative intent show that Chapter 119 does not and was not intended to have application to the legislative branch of Florida government. The analysis of the scope of the Public Records Act begins with an examination of the definition section. The records described in Chapter 119 are those generated by "any agency". "Agency" is defined in Section 119.011(2) as follows:

> "Agency" means any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law and any other public or private agency,

> person, partnership, corporation, or business entity acting on behalf of any public agency.

The key phrase in this definition is "a unit of government created or established by law". The legislature is no more a creation of "law" than is the judiciary. The circuit court found that the legislature is not an "agency" because it is created not by "law", but by the Florida Constitution. The district court erred in equating the constitution ("the organic and fundamental law of the State" (A-2) with the term "law" as used in the context of Chapter 119. First, the district court failed to recognize that the use of the term "law" and "general law" throughout the Florida Constitution refers to acts of the legislature. Notably, Article I, Section 23, Fla. Const., reflects the distinction between a provision in the constitution and the statutory provisions for access to public records. Further, the district court overlooked that this Court determined that "provided by law" in Section 119.07(2)(c) refers to statutory law. Wait v. Florida Power & Light Co., 372 So.2d 421 (Fla. 1979). The district court further declined to give consideration to Chapter 75-225, Laws of Florida, containing a technical amendment to Section 119.07(2)(a), which struck the phrase "acts of the legislature" and substituted the word "law". In sum, there was nothing before the district court to remotely suggest the legislature intended the phrase "created or established by law" to mean established or created by the constitution. It was error for the court to so broaden the meaning of the statute.

That Chapter 119 is directed to executive branch agencies

finds further evidence elsewhere in the Public Records Act. Section 119.14(2)(c) provides in part that "the public has a right to have access to executive branch governmental meetings and records..." (emphasis added). Additionally, Section 119.14(3)(c) provides that public records exemptions are defined in relation to "... the executive branch of state government or to local government..." (emphasis added). If the legislature had intended to include the legislative branch in this general statement of applicability, it would have simply said so. It did not and such inclusion may not be implied. The inclusion of one thing in a statute connotes the exclusion of the other. Where a statute enumerates the things on which it is to operate, it is to be construed as excluding from its operation those things not mentioned. Wanda Marine Corporation v. Department of Revenue, 305 So.2d 65 (Fla. 1st DCA 1974). The 1985 legislature created the reference to "executive branch" records in Section 119.14(3)(c) with knowledge and purpose. The Senate staff analysis explained the change as follows:

> Conforms law to recent Florida Supreme Court Case [Moffitt v. Willis, 459 So.2d 1018 (Fla. 1984)] regarding the Court's power to determine legislative rules, which case effectively exempted the legislature from Chapter 119 and 286.011, F.S., leaving the houses of the legislature, by rule, to regulate their own records and meetings. (R-446).

Rather than being "incidental" as the district court states, the 1985 legislative codification of the term "executive branch" records was a purposeful response to Moffitt v. Willis.

It is instructive that from time to time the legislature has

considered and rejected measures which would make the provisions of Chapter 119 applicable to the legislature. For example, in 1978 two bills were introduced which would have expressly put legislatively-produced records in the same category as records generated by the executive branch agencies under Chapter 119.[3] (R-436-440). As recently as the 1989 regular legislative session, bills were introduced which would have expressly included the House of Representatives and the Senate within the definition of "agency" as set forth in Section 119.011(2), Florida Statutes (Appendix F, G). These measures were not enacted and accessibility to legislative papers continues to be guided internally by the legislature.

The district court's reliance on the attorney general opinions rendered in 1975 and in 1977 is misplaced. The 1975 opinion (AGO 75-282) was premised upon the absence of a House or Senate rule dealing with legislative records. The 1977 opinion (AGO 77-10) was couched in terms of awaiting subsequent judicial clarification. In neither case did the then attorney general have for consideration the following:

1) The 1985 amendments contained in Chapter 85-301, Laws of Florida, discussed supra, defining the scope of the public records act to executive branch agencies;

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[3]It is noteworthy that in 1978 the sponsor of HB 370, which, had it passed, would have brought the legislature within Chapter 119, was Representative Tom Gustafson (R-440). In 1988, Representative Gustafson, as Speaker of the House, presided over the creation of House Rule 1.11, entitled Legislative Records, (R-443) and directed the participation of the House of Representatives in this action under House Rule 2.4. (Appendix E)

2) The House and Senate bills filed in 1978 and 1989 which would have included the legislature within Chapter 119;

3) The benefit of Moffitt v. Willis, supra, and In Re Advisory Opinion Concerning the Applicability of Chapter 119, Florida Statutes, supra; and

4) The existence of a House rule which is contrary in substance and approach to Chapter 119.

An opinion of an attorney general is not binding upon the Court, of course, and the dated AGO's should not be construed as reflecting a current assessment of the law in light of the many rule, statute and case law developments that have occurred since rendition of the original opinions.

Legislative intent is the polestar by which the court must be guided in ascertaining the scope of Chapter 119. Scarborough v. Newsom, So.2d 321 (Fla. 1942). There is no more telling demonstration of legislative intent than the fact that the House of Representatives has chosen, by legislative rule, to treat legislative records in a manner different from and incompatible with the manner in which executive branch records are treated. To conclude that Chapter 119 somehow overlays House Rule 1.11 is to render the legislative rule meaningless.

CONCLUSION

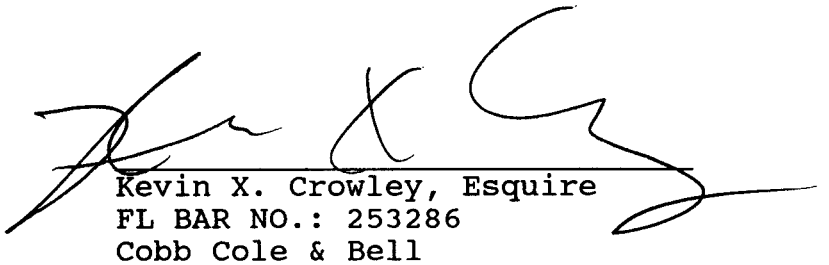
The district court concludes its opinion asking rhetorically: "Why should those [office expense] records not be subject to public inspection? The answer is that such records should be available for public inspection. And because they should, Locke, as a

function of legislative procedure, made his office expense records open for public inspection. The original record shows the Petitioner furnished Respondent (and the public via the media), copies of all bank deposit slips, all monthly bank statements, all checks and check stubs covering his office expenditures (R-9). These records, occupying 425 pages of the record, reflect every district allowance received by Petitioner and every expenditure for his district office. (R-10-435).

The question then is not whether such records ought to be open for public inspection. The issue is whether the judiciary will assert itself as constitutionally empowered to coerce legislative papers through the mechanism of an incompatible and inapplicable statutory scheme.

The decision of the district court of appeal should be reversed.

Respectfully submitted this 26th day of November, 1990.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail on this 26th day of November, 1990, to **Charles P. Horn**, Esquire, Hawkes & Horn, 5641 W. Gulf To Lake Highway, Crystal River, Florida 32629; and to **Valerie W. Evans**, Esquire, 1808 Kalurna Court, Orlando, Florida 32806.

Kevin X. Crowley

APPENDIX TO PETITIONER'S
INITIAL BRIEF

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